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Alfred F. Conard

University of Michigan Law School

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THE ECONOMIC TREATMENT OF AUTOMOBILE INJURIES

Alfred F. Conard*

I. INTRODUCTION

THE automobile has changed more than Americans' ways of transportation. It has changed their ways of housing, of working and playing, of eating, living, and loving. It has also added to their ways of suffering and dying.

The suffering and dying have called forth two kinds of treatment. The better recognized kind is medical treatment, which staves off death and minimizes pain and disability among the living. The less recognized kind of treatment is economic—the restoration to the injury victim or to his dependents of some part of the economic well-being that has been snatched away from them by loss of income and by the costs of medical treatment.

Although the economic treatment has reached sizable dimensions—probably about 2.5 billion dollars a year in the United States¹—until recently, little attention has been given to its scope, its functions, and its additions to or subtractions from the national welfare. Such attention as it has attracted has been directed chiefly to aspects of the remedy provided by tort law—the long waiting lists for jury trial, the alleged pursuit of claimants by “ambulance-chasers,” the take of claimants' lawyers, and the failure of many motorists to insure adequately against liability.² Information on these topics may illumi-

* Professor of Law, University of Michigan.—Ed. The author acknowledges the imaginative and efficient research assistance of Mr. J. Ethan Jacobs, an assistant editor of the *Michigan Law Review*.

1. This estimate covers payments for automobile-related injuries made by liability insurers, life and health insurers, and social security and other social insurance systems. The amount of automobile liability insurance pay-outs in 1960 was reported as about 1.5 billion dollars. A recent survey indicates that liability insurance pay-outs amount to about half of total loss shifting on account of automobile accidents. CONARD, MORGAN, PRATT, VOLTZ & BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION* 1-19, 151 fig. 4-1, 174 fig. 5-10 (1964) [hereinafter cited as AACP].

2. On delay, see LEVIN & WOOLLEY, *DISPATCH AND DELAY: A FIELD STUDY OF JUDICIAL ADMINISTRATION IN PENNSYLVANIA* (1961); ZEISEL, KALVIN & BUCHHOLZ, *DELAY IN THE COURT* (1959); Rosenberg & Sovern, *Delay and the Dynamics of Personal Injury Litigation*, 59 COLUM. L. REV. 1115 (1959); see also Zeisel & Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606 (1963).

For an interesting popular description of the operations of a successful ambulance chaser, see *The Saturday Evening Post*, March 23, 1957, p. 19; see also DRINKER, *LEGAL ETHICS* 64 (1953).

On the high cost of compensation collection, see Franklin, Chanin & Mark, *Acci-*

nate the work of lawyers and judges, but it throws little light on the plight of the injury victims.

Fortunately, attention is belatedly shifting from the problems of jurists to those of injured people. Within the past ten years, a remarkable body of information concerning economic treatment has emerged. For the first time since the parameters of the problem were radically revised by the birth of the welfare state,³ observers have the means of viewing the problem of economic treatment with a reasonably broad grasp of its magnitude and of the spectrum of phenomena that it includes.

The most comprehensive of the reports containing this new information is a state, national, and international study of injury reparation produced at The University of Michigan by an interdisciplinary and international team of researchers and contributors.⁴ Two other comprehensive studies of automobile injury consequences have been produced by John F. Adams of Temple University, based upon surveys in Philadelphia and New Jersey.⁵ A more nar-

dents, Money, and the Law: A Study of the Economics of Personal Injury Litigation, 61 COLUM. L. REV. 1, 20-30 (1961); see also Bloom, *When the Lawyer Gets the Spoils*, Readers Digest, March 1960, p. 105.

On failure to insure adequately against liability, see LaBrum, *Time for Action: The Problem of Motorists' Insurance*, 45 A.B.A.J. 692, 693 (1959); see generally GREGORY & KALVEN, *CASES ON TORTS* 733-42 (1959). Report number 1 of the [Michigan] Governor's Commission To Study the Problem of the Uninsured Motorist (1958) [unbound and unpublished], indicates at note 3 that, while the uninsured and financially irresponsible motorists are about 10% of the total number of motorists, they are involved in slightly more than 20% of the accidents.

On simulated or exaggerated claims, see Gannon, *Insurance Cheats*, Wall St. J., Aug. 28, 1964, p. 1, col. 1.

3. In the last year before the F. D. Roosevelt administration, a comprehensive study of automobile accidents was published. REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (Columbia Univ. Council for Research in the Social Sciences, 1932) [hereinafter cited as THE COLUMBIA REPORT]. Much of the information it contains has dubious application today because of the subsequent rise of the social security system and other devices for providing aid to the injured.

4. AACP. The central feature of this report is a survey of automobile injury victims throughout the state of Michigan, indicating the kinds and extent of their economic losses and the reparation that they reap from tort law, from private life and health insurance, from social security, from poor relief, and from other sources. The survey includes significant information on the causes of dispute, the delay in collecting reparation, and the personal opinions and reactions of lawyers and their clients. Another section of the study compares the national volume costs of reparation through the tort law system with those of reparation by way of private loss insurance, social security, and other regimes; this section also contains analyses of the social objectives and achievements of the various systems. In a third section of the study, four foreign contributors explain how similar problems are handled in England, France, Germany, and Sweden.

5. Adams, *A Survey of the Economic-Financial Consequences of Personal Injuries Resulting from Automobile Accidents in the City of Philadelphia, 1953*, Temple Univ. Economics & Business Bull., March 1955 [hereinafter cited as Adams '55]. It is based upon interviews with accident victims in the city of Philadelphia and produced rather

rowly focused study, with sharply outlined conclusions on the adequacy of reparation, was made by a research team at the University of Pennsylvania, based upon accidents occurring in 1956 in the Philadelphia metropolitan area.⁶ A wealth of information on the attitudes and behavior of injury victims was yielded by a study of minor injury cases in New York City. Under the title, "Who Sues in New York?," this provocative and readable volume probed the motivation of injury victims in deciding to sue or not to sue, as affected by the extent of their injuries, their contributory negligence or lack of it, their lawyer contacts, and other elements.⁷

In addition to these studies focused on reparation, there are a number of important studies conducted from engineering and medical points of view on the causes and consequences of accidents. The highway departments of several states, with encouragement and guidance from the Federal Bureau of Public Roads, have conducted studies of the total "direct costs" of automobile accidents.⁸ Engineering studies of accident causes that consider elements of automotive

startling evidence that about 30% of the accidents were caused by uninsured automobiles, although the percentage of uninsured automobiles registered was considerably less. It also demonstrated for the first time the frequency and significance of sources of reparation other than tort liability. In addition, this report presented illuminating information and trenchant comments on settlement procedures of liability insurance companies and on the attitudes of injury victims.

Adams, *A Comparative Analysis of Costs of Insuring Against Losses Due to Automobile Accidents: Various Hypotheses*—New Jersey, 1955, Temple Univ. Economics & Business Bull., March 1960 [hereinafter cited as Adams '60]. It was based upon a state-wide sample of automobile accidents in New Jersey and was undertaken in order to estimate the increase in costs that would result from substituting a compensation system for the existing tort liability system. In the course of this survey, rather specific estimates were made of the amounts contributed to reparation by the various regimes at work, with the indication that tort liability furnishes less than half of the total reparation that victims receive.

6. Morris & Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913 (1962). Like the Michigan and the Adams surveys, this one included reparation from loss insurance and social security as well as sums paid to discharge tort liability.

7. HUNTING & NEUWIRTH, *WHO SUES IN NEW YORK CITY?* (1962).

8. COST OF MOTOR VEHICLE ACCIDENTS TO ILLINOIS MOTORISTS, 1958 (Ill. Dept. of Pub. Works and Bldgs., Div. of Highways, 1962). There is a summary of this information in Billingsley & Jorgenson, *Analyses of Direct Costs and Frequencies of Illinois Motor-Vehicle Accidents, 1958*, Public Roads, Aug. 1963, p. 201. A symposium in Public Roads, June 1960, p. 33, entitled "Four Articles on Traffic Accident Costs" compares accident data from Utah and Massachusetts. Similar statistics were compiled in New Mexico, but have not been put in a form generally available to the public.

These studies are directed toward accident costs per vehicle mile on different kinds of roads, but they supply some useful points for comparison with the reparation surveys as to the number and distribution of personal injury accidents. They also contain some arresting indications that more money is paid for legal services than for health services as a result of accidents and produce impressively high figures for the amount of "awards in excess of known costs."

design and apparatus have been published by the Cornell University Automotive Crash Injury Research program.⁹ Medical studies of fatality cases, with autopsies on automobiles and victims alike, have been conducted at the Harvard School of Public Health¹⁰ and, more recently, at the University of Michigan School of Medicine.¹¹

II. RESULTS OF THE NEW RESEARCH

The results of the new research make it possible to view injury treatment as a problem of human suffering and deprivation, rather than as a problem of tort theory, judicial administration, or professional ethics. To appreciate the difference, one must look back over the products of the mental exertions of legal scholars relating to automobile injuries in the past half century.

Through the years, foremost attention in the literature of the law has been given to those problems that are chiefly involved in the decisions of appellate courts, which, in the Langdellian tradition, are the prime working material of "legal science."¹² On this plane, the main subject of attack has been the principle of contributory negligence, whereby an injury victim is denied any compensation under tort law if he has contributed to his injury by any fault of his own. Researchers have contended that the doctrine of "comparative negligence" is more in accord with moral ideas of the community¹³ or have measured the effects on procedure and insurance costs of such a change.¹⁴

9. The results of these studies have been published as monographs on the effectiveness of seat belts, safety window glass, padded instrument panels, and other elements. A list may be obtained on request from the Cornell Aeronautical Laboratory, Inc., P.O. Box 235, Buffalo 21, New York; a summary of major findings is published in *HUMAN FACTORS IN TECHNOLOGY* 230-36 (1963); O'Connell, *Taming the Automobile*, 58 NW. U.L. REV. 299, 334-56 (1963), contains an interesting discussion of the possibilities suggested by these studies for improvement in automobile safety.

10. RESEARCH ON FATAL HIGHWAY COLLISIONS, PAPERS 1961-62 (Moseley ed.); *id.*, PAPERS 1962-63 (Moseley ed.). See also *They're Finding 'Why' in Auto Wrecks*, *Journal of American Insurance*, Nov. 1963, p. 1. These studies emphasize the safety potentiality of design and apparatus, but they also indicate the presence of suicidal or homicidal elements in far more automobile "accidents" than previously had been thought likely.

11. Gikas & Huelke, *Causes of Death in Automobile Accidents: Can Seat Belts Really Save Lives?* 63 J. MICH. S. MEDICAL SOC'Y 351 (1964).

12. "First, that law is a science; secondly, that all the available materials of that science are contained in printed books." C. C. Langdell, 1886, quoted in 2 WARREN, *HISTORY OF THE HARVARD LAW SCHOOL* 374 (1908).

13. Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135 (1958); Philbrick, *Loss Apportionment in Negligence Cases* (pts. 1-2), 99 U. PA. L. REV. 572, 766 (1951); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Turk, *Comparative Negligence on the March* (pts. 1-2), 28 CHI-KENT L. REV. 189, 304 (1950).

14. Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L.

On a similar plane of inquiry, critics of the existing law have attacked the rules affecting the rights of guests and members of the family of the guilty driver or of the vicariously liable automobile owner.¹⁵ Some find it immoral that the guest should be able to sue his host or the child his parent, while others find it just as revolting that he should be forbidden to do so.

A more recent wave of research has stepped down from the altitudes of legal principles, as formulated by appellate courts, to the goings-on in the trial courts. Here a principal concern has been delay in getting to trial, with weighty studies investigating the length of the delays and the effectiveness of various attempts to shorten the waiting time.¹⁶ Another subject of concern among the trial investigators has been the medical witnesses and the startling conflicts in their "expert testimony."¹⁷ Significant experiments have been launched in New York and Illinois to test the effectiveness of substituting "impartial" expert witnesses, nominated by the court, for the "partisan" witnesses procured by the respective antagonists in the struggle.¹⁸

A third type of research has stepped out of the courtroom and into the lawyer's office to investigate the costs of hiring lawyers to recover compensation for injury claimants, with or without suit.¹⁹

Valuable as these studies have been, most of them have the limitation that they focus on the business of lawyers—appeals, trials, and client representation. The legal researcher learns all that is in them, only to find that he still knows very little about the people who are injured in automobile accidents and how they have been impoverished or enriched; he has no idea whether there are some other people who do not find, or are not found by, claimants' compensation attorneys and, if so, whether the people who stay outside the toils of lawyers and court proceedings are a small minority or the great majority of the injury victims.

A researcher who is interested in people will necessarily demand studies that tell him something about people who escape the law's toils as well as about those who get into them; he will be less inter-

REV. 689 (1960); Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89 (1959).

15. See, e.g., Pedrick, *Taken for a Ride: The Automobile Guest and Assumption of Risk*, 22 LA. L. REV. 90 (1961).

16. See authorities on delay cited in note 2 *supra*.

17. See, e.g., *Symposium*, 34 TEMPLE L. Q. 476 (1961); Comment, 55 NW. U.L. REV. 700 (1961).

18. *Ibid.*

19. Franklin, Chanin, & Mark, *supra* note 2.

ested in how long trials are delayed than in how many accident victims are never compensated at all.

If such data are demanded by a legal researcher, they must be even more essential to an appraisal of the problem by an economist, a sociologist, or a public-health physician. Thus, it is striking that the impact of automobile injuries has attracted such minimal attention from social scientists, who have poured forth their efforts on industrial injuries,²⁰ which are less costly in the aggregate than automobile injuries.²¹ The trouble seems to be that there has been no supply of the kinds of facts about automobile injuries that would be of interest to a social scientist. He does not care much about tort theory, and he sees trial delay and lawyers' fees as narrow problems, of interest only to a clique of specialists.

The purpose of the new research is to supply data that are useful for viewing injury reparation as a community problem that is not only legal but also social and economic. Such a view will help to preserve or remold reparation to the advantage not only of appellate judges, trial lawyers, litigants, and law professors but also of the common man who suffers injury and pays insurance premiums.

This research is "new" not only because it is recent; it is also new in approach. It is not like the research of the Committee to Study Compensation for Automobile Injuries,²² which was directed (taking the most charitable view) toward finding whether a particular plan was better or worse in its entirety than the tort law system; nor is it like the bits of subsequent research directed toward answering the same question.²³ It is multi-purpose research. Without doubt, it may intensify the convictions of those who wish to displace tort law with a compensation system. It may supply ammunition also to the protagonists of the tort system. But it is designed primarily to illuminate the facts, not to polarize them.

20. See, e.g., the bibliographic notes in SOMERS & SOMERS, *WORKMEN'S COMPENSATION* (1954); see also the current bibliographies, "Book Reviews and Notes" in *Monthly Labor Review*, and "Recent Publications" in *Industrial and Labor Relations Review*.

21. The National Safety Council reports that in 1962, 13,700 people died in work related accidents and two million suffered injuries that disabled them beyond the day of the accident. For the same period, 40,900 died in motor vehicle accidents and 1.5 million suffered injuries that disabled them beyond the day of the accident. The Council reports that the "cost" of work related accidents in 1962 was five billion dollars, while the "cost" of motor vehicle accidents in the same year was 7.5 billion dollars. (A motor vehicle accident that happens during the course of the injured's employment is counted both as a motor vehicle accident and as a work accident.) NATIONAL SAFETY COUNCIL, *ACCIDENT FACTS* 3, 5 (1963 ed.). See also note 76 *infra*.

22. THE COLUMBIA REPORT.

23. See James & Law, *Compensation for Auto Accident Victims: A Story of Too Little and Too Late*, 26 CONN. B. J. 70 (1952).

A. *The Persistence of Injury Claims*

Since most of the existing literature about injury victims concerns litigation processes, a social observer might wonder at the outset what fraction of the injury cases persist to the litigation stage. A capsule answer may be given in the form of a table, starting with the number of people who suffer losses in personal injury automobile accidents and comparing the numbers who persist to various successive stages—hiring a lawyer, filing suit, commencing a trial, and appealing a judgment. Taking all the injury cases as one hundred per cent, the Michigan survey indicated the following persistence frequencies:²⁴

| Persons with losses | Persons hiring lawyers | Persons starting trial | Persons appealing to higher court |
|---------------------------|------------------------------|------------------------------|--|
| 100% | 14% | 0.6% | 0.1% |

This table refers to the totality of persons who suffer economic loss in personal injury accidents. A researcher into "law in action" would presumably be interested in this totality, since tort law purports to provide the same standards for injuries of all degrees and the famous principle "*de minimis*" does not exclude tort injuries, however minute.²⁵

A social scientist might prefer to confine his attention to cases that present some significant impact on productivity and welfare. For this reason, the Michigan study selected a group of "serious injury cases," defined as cases in which the injury victim had medical expenses of five hundred dollars or more, was hospitalized for two weeks or more, suffered a permanent physical impairment, or died. For these cases the persistence was as follows:²⁶

| Suffering serious injury | Hiring lawyers | Commencing trial | Appealing to higher court |
|--------------------------------|-------------------|---------------------|---------------------------------|
| 100% | 49% | 5% | .5% |

Even in this group, the legal apparatus touched less than half the

24. AACP 155 fig. 4-3, 241 fig. 7-2.

25. "The maxim [*De minimis non curat lex*] has no application to money demands." BALLENTINE, *LAW DICTIONARY* 356 (1948 ed.). Although they do not explicitly so state, the following works take this interpretation for their starting assumption in the calculation of damages in actions for negligence: HARPER & JAMES, *TORTS* § 25.1 (1956); MCCORMICK, *DAMAGES* §§ 124 (a), 137 (1935); PROSSER, *TORTS* § 35 (d) (2d ed. 1955).

26. AACP 184 fig. 6-1, 241 fig. 7-2.

injured persons, the trial process less than a tenth, and appellate proceedings less than a hundredth.

These figures raise considerable doubt about what can be achieved for injury victims by improving the procedure of trial courts. Even if courtroom procedures were ideally speedy, dignified, and objective, their excellence would remain unfelt by ninety-five per cent of the serious cases and the ninety-nine plus per cent of all cases which are settled outside of court.

Improvement of trial procedures would improve the lot of the mass of claimants only if all claimants could readily obtain a prompt and fair trial. If that were true, settlement would naturally reflect the expected result of such a trial. A contemplation of this possibility leads to a second implication of the statistics. If a trial were obtained by just one out of every nineteen of the serious injury victims who now settle without trial, the number of trials conducted would have to increase by *one hundred per cent*. A minute decrease in the settlement rate would deluge the already overcrowded courts with an even more oppressive mass of cases.

This observation leads to other conclusions. One is that the furnishing of speedy trials is likely to require a multiplication of courtrooms, judges, and juries far beyond anything that has been discussed by the students of the law's delays. If trial facilities are not greatly multiplied, no improvement in trial procedures is likely to do much for nineteen-twentieths of the litigants. Improvements that make court procedures more attractive will only increase the congestion. A more likely means of reducing congestion is to find some method of facilitating settlement without the necessity of trial.

B. *The Sources of Reparation*

Most of the prior information regarding compensation for injury victims' losses has been directed single-mindedly at "damages" paid because of adjudged or presumed liability of a "tortfeasor" to an injury claimant. The main text of the Columbia report,²⁷ and the follow-up by a Yale group in 1950,²⁸ reported only about these payments. A part of the Columbia report that reported on compensation from other sources was relegated to an appendix and was ignored in the Columbia recommendations.²⁹

In the meantime, there has been a gigantic rise of new sources

27. THE COLUMBIA REPORT.

28. James & Law, *supra* note 23.

29. THE COLUMBIA REPORT 218.

of help likely to benefit an injury victim or his survivors. The first of these is the system of survivors' benefits under the Old Age and Survivors' Insurance program of the Social Security Administration authorized by Congress in 1935.³⁰ Because of this program, the widow of a fatal injury victim is now assured of lifetime assistance regardless of success in her claim for damages, provided her husband was part of the vast working population that is covered by the Social Security program. By 1960, this program offered potential benefits to about eighty per cent of United States families.³¹

The second invader of the reparation scene was health insurance, which began a meteoric growth about 1940 and now covers, in one form or another, about seventy per cent of Americans.³²

The third entrant on the reparation stage was the Social Security program of disability benefits, which began for older persons in 1956,³³ but which first reached out to a majority of the working population in November 1960.³⁴

One of the striking discoveries of the last decade's research has been the impact of the first two of these programs, along with other rights outside the realm of tort law, on the welfare of injury victims. The third of the items—the disability program—arrived too late to be reflected in any of the studies published up to the time of this writing.

Several surveys—two in Philadelphia, one in New Jersey, and one in Michigan—have indicated that a half-dozen sources of compensation for accident losses have been added to "damages" under tort law.³⁵ The first Philadelphia study and the Michigan study

30. 49 Stat. 622 (1935), as amended, 42 U.S.C. §§ 401-22 (1958), as amended, 42 U.S.C. §§ 401-22 (Supp. V, 1964).

31. Eighty-seven per cent of employed persons are potentially protected by Social Security Survivors Insurance. AACP 42 table 1-1. To become a "fully insured individual," however, one must be in covered employment for any forty quarters, or for one-fourth of the quarters between 1950 or his twenty-first birthday, whichever is later, and his date of death or retirement, whichever is earlier, but at least six quarters. Those who died before 1950 needed at least six quarters of coverage. 75 Stat. 137 (1961), 42 U.S.C. § 414 (Supp. V, 1964).

32. AACP 42 table 1-1, 71 fig. 1-3.

33. 70 Stat. 815 (1956), as amended, 42 U.S.C. §§ 423-25 (1958).

34. 74 Stat. 967 (1960), as amended, 42 U.S.C. § 423 (Supp. V, 1964).

35. AACP 146 table 4-8 shows the following percentages of persons injured in automobile accidents who received some compensation from the following sources: injury victim's own insurance, 63%; tort liability settlements, 49%; employer [including sick leave], 4%; workmen's compensation, 1%; social security and other pensions, 1%; others, 3%. The total exceeds 100% because some respondents reported more than one source of reparation.

Table 19 of Adams '60, at 26, shows the following percentages of persons injured in automobile accidents who received some compensation from the following sources:

provide quantitative estimates of the amounts received from some of these programs. They indicate that tort damages provided only about half of the total help that injury victims received.³⁶

For two reasons, the actual contribution of the non-tort programs is probably greater than the fifty per cent indicated by the Philadelphia and Michigan studies. One reason is the more rapid growth in the total social security and health insurance programs than in the tort liability program.³⁷ In all likelihood, each doubling of health insurance or OASDI volume is accompanied by an approximate doubling of their contribution to automobile injury victims. A second reason for believing that the non-tort programs are greater than indicated is that the conservative methods of estimation used in the various surveys tended to understate social security payments much more than they understated damage payments. In the Philadelphia studies, only benefits already received were counted; future

respondent's own insurance, 33.80%; the other party's insurance, 34.64%; the other party personally, 3.93%; the respondent personally, 21.46%; temporary disability or unemployment insurance, 2.17%; workmen's compensation, 2.38%; other and unknown sources [chiefly intra-family loans], 1.68%. The total equals exactly 100% because the percentages were taken not with respect to the number of people responding, but with respect to the total number of responses.

36. AACP 147 table 4-9 shows the following percentages of the aggregate amount of reparation received from various sources: tort liability settlements, 55%; injured person's own insurance, 38%; social security, 2%; employer [including sick leave], 1%; workmen's compensation, less than 1/2 of 1%; other, 4%.

Table 36, and the text at page 38 of Adams '60 show the following percentages of the aggregate amount of reparation from the various sources: victim's insurer 37.07%; other party's insurer, 32.42%; other party personally, 2.88%; respondent personally, 24.42%; temporary disability, unemployment insurance, and workmen's compensation, 3.21%.

AACP defined a class of injury victims labeled "serious" and studied these in addition to the general class of all personal injury accident victims. The arbitrary definition of a serious injury was one that (1) required hospitalization for three weeks or more; or (2) occasioned hospital and medical expenses of five hundred dollars or more; or (3) occasioned death or some degree of permanent physical impairment. Figure 5-10, p. 174, shows the following percentage distribution of aggregate amounts of reparation from the various sources in serious injury cases: tort liability, 46%; own insurance [principally life, hospital-medical, and automobile insurance], 27%; future compensation expected [principally death and disability benefits under federal social security], 14%; others, 13%.

37. Pay-outs for disability and death by OASDI (the federal old age, survivors, and disability insurance program) in 1960 were more than two hundred times those in 1940. STATISTICAL ABSTRACT OF THE UNITED STATES, 1962, at 284. Pay-outs by automobile liability insurance companies for the same periods are not available, but premiums for automobile bodily injury liability in 1960 were about ten times those in 1940. INSURANCE STATISTICS, 1962, at 8. Although the growth rates of social insurance and health insurance were not radically different from liability insurance during the 1950's, the broad legislative extensions of disability insurance in 1960, 74 Stat. 967 (1960), 42 U.S.C. § 423 (Supp. V, 1964), and of health insurance in 1962, 76 Stat. 197 (1962), 42 U.S.C. §§ 1381-85 (Supp. V, 1964), seems to presage further surge of volume in the social and health insurance areas. See generally AACP 71 fig. 1-3.

benefits were excluded as too speculative.³⁸ Since social security benefits are generally paid in monthly instalments over a lifetime, the exclusion of future payments resulted in their gross understatement.

There should be less understatement of social security benefits in the Michigan survey, where future social security benefits were estimated and included in the reparation total. But the future instalments were entered at discounted values in order to facilitate comparison with damage payments and other lump sum payments. In fact, they are eventually paid in full, not in discounted sums. Thus, a more valid comparison would be one that would show the actual amounts received throughout life from social security benefits and the actual amounts received throughout life by damage claimants from lump sum settlements plus any interest or profits received from investing them. But this ideal projection would require an impossible foreknowledge. Therefore, the more conservative statement of discounted present values had to be followed, despite its known bias.³⁹

In the light of these revelations about the sources of reparation, it is no longer satisfactory to analyze the welfare of injury victims in terms of what they get in damages. The analysis must be in relation to the entire retinue of programs for the aid of the stricken. These include health insurance, old age and disability insurance, life insurance, collision and personal property insurance, sick leave pay, workmen's compensation, public assistance, charity, and some additional sources.⁴⁰

C. *The Costs of Loss Shifting*

A third disclosure of the new studies is the fantastic variations in the costs of distributing help in the various systems and the high rate of expense of the damage system in relation to the benefits that it distributes.

An impeccably documented study of lawyers' fees in New York County showed that more than a third of the total amount of money paid out as damages for personal injuries went to the claimants' lawyers.⁴¹ In Michigan a statewide survey of collection expenses

38. Morris & Paul, *supra* note 6; Adams '55.

39. See AACP 372, 374 table 9-19 for a more complete explanation of the discounting of future payments of money to compute present value.

40. For example, a Veteran's Administration or municipal hospital may give free, or virtually free, medical care in many cases. Surveys frequently do not or cannot count this and consequently deal only with the money actually paid or promised to the injury victim. Cf. AACP 170-75.

41. Franklin, Chanin & Mark, *supra* note 2, at 21, 25 chart III.

(including lawyers' fees) showed them amounting to about a quarter of the gross settlements.⁴² The broadly based Illinois study indicated that more money was spent on legal expenses arising out of accidents in that state than was spent for medical treatment.⁴³ The New Jersey survey indicated high collection expenses, although no overall ratio estimate was attempted.⁴⁴

The Michigan study also estimated total expenses of the damage system, adding to lawyers' fees the litigation expenses of claimants themselves, the costs of selling and administering insurance, and the costs of keeping courts open for injury cases.⁴⁵ This summation indicated that the operating costs of the damage system are about 120 per cent of the net benefits that go to the injury victims themselves; the net amounts that the victims get are less than the total retained by insurance companies, law offices, and courts. Presumably, the cost ratio would be even higher in such states as New York and Illinois, where it appears that the legal expenses are substantially higher than in Michigan.⁴⁶

In contrast, private loss insurance systems (embracing principally life insurance and health insurance) showed average costs of about twenty-two per cent of net benefits.⁴⁷ In some Blue Cross systems the operating costs drop to less than five per cent of the net benefits, and in Social Security programs they drop to about two per cent.⁴⁸

42. AACP 138 table 4-1 shows legal collection expenses to be 11.5 million dollars in personal injury accident cases in Michigan in 1958, and table 4-2, p. 139, shows total insured and uninsured tort liability reparation to be 46.7 million dollars for the same period; thus legal collection expenses were 24.6% of tort liability reparation. AACP 190-92 discusses the cost of collection in serious injury cases; when some cost was incurred, the mean was thirty-two per cent of the total recovery.

43. Billingsley & Jorgenson, *supra* note 8; ILL. DEPT. OF PUB. WORKS AND BLDGS., DIV. OF HIGHWAYS, *op. cit. supra* note 8, at 95 table C1-01.80-1; Jorgenson, *supra* note 8. AACP 138 table 4-1 shows total collection expenses to be about forty-six per cent of the total medical expenses: 11.5 million dollars total collection expenses and 25.1 million dollars total medical expenses.

44. Adams '55 at 55 table 34.

45. See AACP 59 table 1-4, 61 fig. 1-1.

46. Compare text at note 41 *supra*, with text at note 42 *supra*; see also note 43 *supra*.

47. This figure is not the expense rate of any particular system, but an average of all systems. A sample of the variations included may be quickly gained by comparing the loss ratios shown in BEST'S FIRE AND CASUALTY AGGREGATES AND AVERAGES. In 1961, stock companies reported aggregate loss ratios for individual hospital and medical insurance of 52.2%; for group accident and health of 82.9%; for workmen's compensation of 64.3%. On the other hand, Blue Cross insurance in 1961 had an average operating cost ratio of about 7%. Reed & Rice, *Private Consumer Expenditures for Medical Care and Voluntary Health Insurance, 1948-62*, Social Security Bulletin, Dec. 1963, pp. 3, 9 table 7.

48. 2 HOSPITAL AND MEDICAL ECONOMICS: A STUDY OF POPULATION, SERVICES, COSTS, METHODS OF PAYMENT, AND CONTROLS 1072 n. 1 (McNerney ed. 1962). Social Security Bulletin, Annual Statistical Supplement, 1960, at pp. 6 table 7, 8-9 table 10, & 21 table 21.

The obvious lesson for those whose concern is the plight of the injury victims is that an increase in the generosity of tort damages is the most expensive way of bringing aid. Attention should be directed instead to the broadening of social security protection, group health insurance, and private loss insurance, in that order.

This does not mean that the damage system is bad or useless. It does furnish compensation to injury victims. In fact, it furnishes more compensation than any of the other systems taken alone.⁴⁹ It also furnishes a way of forcing public attention to the needs of those injury victims for whom no more merciful avenue is provided. It also may serve to vindicate the innocent and admonish the guilty and to provide an incentive to persons involved in accidents to give the facts to the police. But these possible advantages should not be confused with providing reparation for injury losses, which can be done much more economically in a number of other ways.

D. *The Maldistribution of Benefits*

Another startling disclosure of the new studies is the capricious pattern of compensation for injury victims. About half of the serious injury victims are reimbursed less than half of their monetary loss,⁵⁰ to say nothing of their psychic losses of pain and suffering, anxiety, humiliation, and bereavement. On the other hand, substantial percentages of victims receive two, three, four, or five times the amount of their economic losses.⁵¹

It would be logical, of course, that a substantial fraction of injury victims would receive nothing at all because of the common-law principle of contributory negligence. A rule of comparative negligence, if adopted, might explain why hardly anyone gets his full losses repaid and why the records show reparation ranging from zero to one hundred per cent of the actual losses. The concept of compensation for pain and suffering would explain also why some claimants receive far more in dollar awards than the amount of their economic losses.

But none of these theories would justify the distribution that exists, with the least significant losers regularly receiving the largest multiple of losses and the really tragic cases of permanent disability receiving the smallest fraction. Yet this pattern is quite conclusively shown in two independently conducted studies of the last decade.

49. AACF 139 table 4-2; *id.* at 147 table 4-9; *id.* at 151 fig. 4-1.

50. AACF 178-80.

51. Morris & Paul, *supra* note 6, at 917 fig. 1.

The Pennsylvania study, starting at the bottom, presents compensation ratios on losses ranging in size from under one hundred dollars to over three thousand dollars. In the "under one hundred dollars" group, one out of three claimants obtained more than five times the money he had lost. The ratios fell steadily as the amounts of loss rose, until, in the over three thousand dollar group, no one received over five times his loss.⁵² The Michigan study picks up the comparison with victims of losses under one thousand dollars in the smallest group, rising to losses over twenty-five thousand dollars in the largest significant group. Under one thousand dollars, thirty-two per cent obtained more than one and one-half times their economic loss; in the group with losses over twenty-five thousand dollars, only five per cent got such a high ratio.⁵³ The same maldistribution was reported by the Columbia study for accidents in 1929, measuring damage compensation only.⁵⁴ This whimsical pattern of compensation still prevailed in the 1950's, after social security, health insurance, and other sources of help had been added to the reparation repertory.

E. *Insulation of the Tort-feasor*

A fifth conclusion impelled by recent research is that the individuals whose negligence causes accidents, or whose different conduct might have avoided them, pay an almost negligible share of the total reparation received by injury victims. Even defendants who had been sued did not know, in one-third of the cases, what disposition had been made of the case. Defendants whose cases were settled without the filing of an answer were ignorant of the outcome sixty-four per cent of the time.⁵⁵ Presumably, the percentage of ignorance would be even higher among the ninety-five per cent of potential defendants who were not even sued.

These facts nullify most of the underpinning of contemporary tort theory. Tort theorists are accustomed to justify the law on the ground that it makes the wrongdoer pay, or shifts the loss to the wrongdoer.⁵⁶ These theories prove to be poetic fallacies. The losses are not shifted to wrongdoers, but to right-doers: the conscientious drivers who buy liability insurance.

These five lessons are not the only results of the new studies.

52. *Ibid.*

53. AACP 179 fig. 5-13.

54. THE COLUMBIA REPORT 62.

55. AACP 297 table 8-17.

56. James, *Accident Liability Reconsidered*, 57 YALE L.J. 549 (1948).

But they are enough to present the broad outline of the human problem that is to be treated. They also provide strong indications that the problem is not likely to be solved within the confines of the tort system, or even within the confines of all the existing systems. The time has come to lay the existing systems to one side, to look at the human needs that are to be met, and to design, on a clean sheet of paper, the remedies that are needed.

III. NEW PRESCRIPTIONS FOR ECONOMIC TREATMENT

The disclosures of recent research open the door to a fresh look at reparation for automobile injuries. Reparation can now be viewed as one of the processes of the social metabolism and examined for evidence of hyper- or hypo-activity and for benign or malignant effects. This view is made possible by new knowledge of the volume, the speed, and the direction of the reparation flow.

In the following pages I should like to experiment with this new approach. I will not pause to evaluate the important contributions to thought made by previous proposals. Like anyone else who thinks about this problem area, I am tremendously indebted to the Committee To Study Compensation for Automobile Accidents, whose Report has commanded the attention of legal writers and thinkers for three decades. I am indebted to the many who kept the subject alive in the ensuing decades,⁵⁷ a Duke (now Harvard) professor named David F. Cavers,⁵⁸ a Cincinnati judge named Robert S. Marx,⁵⁹ a Yale professor named Fleming James,⁶⁰ a New York justice named Samuel Hofstadter.⁶¹ I am grateful for the insights of Albert Ehrenzweig,⁶² Leon Green,⁶³ Arne Fougner,⁶⁴ Clarence Mor-

57. Most recently, Marshall, *The Unreality of Accident Litigation: A Plea for a New Approach*, 50 A.B.A.J. 713 (1964).

58. Symposium—*Financial Protection for the Motor Accident Victim*, 3 LAW & CONTEMP. PROB. 465 (1936). This symposium contains several articles of current interest: one on the uncompensated accident victim by Emma Corstvet, who made the important Connecticut Case Studies that were printed as an appendix in THE COLUMBIA REPORT; one on the changing rules of automobile liability by Richard M. Nixon, later vice-president of the United States; and one article on each side of the debate over an automobile compensation plan, with Shippen Lewis taking the affirmative and P. Tecumseh Sherman the negative.

59. Marx, *Compensation Insurance for Automobile Accident Victims: The Case for Compulsory Automobile Compensation Insurance*, 15 OHIO ST. L.J. 134 (1954).

60. James, *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 COLUM. L. REV. 408 (1959).

61. Hofstadter, *Alternative Proposal to the Compensation Plan*, 42 CORNELL L.Q. 59 (1956).

62. EHRENZWEIG, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM (1954).

63. GREEN, *TRAFFIC VICTIMS: TORT LAW AND INSURANCE* (1958).

64. Mr. Fougner, president of the Christiana General Insurance Company of New

ris and James Paul⁶⁵ and others who have offered fresh solutions to the problem. I am fortunate to have seen papers by Professors Keeton and O'Connell,⁶⁶ and by Kalven and Blum,⁶⁷ which have brilliantly summarized and analyzed the results of three decades of discussion of the Columbia compensation plan and its rivals.

Rather than to add a surrebutter to the arguments so masterfully advanced, or even to color their classic disputations with the hues of new evidence, I should like to make a new start from the social situation. I propose to state what are the emergent needs discernible in the social situation and the most likely ways, among society's many loss-spreading devices, to remedy the ills. If this search leads me back to tort law and compensation plans, I will not resist; if it leaves the classic arguments untouched, I make no apology.

While I hope to take my inspiration from the findings of recent research, I acknowledge that prescription of legal measures can never be the product of purely scientific observation. Prescription requires a large number of personal judgments of what things are desirable and which things are more desirable. The prescriptions that are proposed in the following pages for the reparation of automobile injuries are not compelled by the findings of research; they are the writer's personal opinions, formulated in the light of research findings. The same findings may lead other researchers to radically different conclusions.

A. *Rehabilitation*

The most important service that economic treatment can perform is to assure the accessibility of medical treatment. Wounds should be healed, bones set, prostheses supplied, psychic readjustment achieved, and occupational retraining provided when needed.

These things should be done, it seems to me, for every victim, regardless of whether or not the victim was himself careless, whether or not the guilty driver can be found, and whether or not he can pay or has purchased adequate insurance. Medical services should

York, has made several proposals in unpublished speeches to insurance and bar associations. A popular presentation of some of his ideas appears in Fougner & Rankin, *For Auto-Accident Victims—A New Kind of Insurance*, Readers Digest, May 1961, p. 107.

65. Note 6 *supra*.

66. Keeton and O'Connell plan an article to be called "Basic Protection for the Traffic Victim," or some similar title, to be published in the *Harvard Law Review* for December 1964 and a book to be published by Little, Brown & Co. in 1965.

67. Blum & Kalven, *Public Law Perspectives on a Private Law Problem—Auto Compensation Plans*, 31 U. CHI. L. REV. 641 (1964).

be supplied for humanitarian reasons—because the modern conscience demands that no one unnecessarily be left physically impaired. They should also be supplied for economic reasons—because everyone loses when a member of society ceases to contribute to the national product and becomes instead a burden on the shoulders of others.

Fortunately, the need for medical treatment is being met very well in the minor injury cases, which constitute the great majority of cases. Probably the most important source is the victim's own resources and those of his immediate family. This source has not been measured by any study. After the victim's own family resources, the next most important source is health insurance, now covering in some measure seventy per cent of Americans.⁶⁸ Tort law does not seem to play a large role in paying medical bills, although it obviously tends to restore the personal resources that have been applied, and the prospect of getting damages may encourage private expenditure for medical treatment. A considerable number of injury victims receive "free" medical or hospital care, and a great many receive heavily subsidized care from public and private hospitals. There are also cases in which large medical bills are paid by charities.⁶⁹

The Michigan survey asked how often necessary medical care was lacking. No cases were found in which emergency care or treatment of acute conditions failed for financial reasons, although the care given was "unsatisfactory" in about fourteen per cent of the cases.⁷⁰ On the other hand, a small but significant group failed for financial reasons to receive rehabilitative care—resetting of bones, cosmetic surgery, retraining in the use of muscles, and occupational retraining. This type of failure appeared in only one to two per cent of the serious injury cases, which translates into one to two hundred cases a year in Michigan.

It is easy to see why rehabilitative treatment is frequently missed. It is "elective" treatment in the sense that no acute suffering drives the patient inevitably toward it. It is most frequently needed in very severe cases, in which months of unemployment and medical bills have exhausted the patient's own resources, his own medical insurance, and the damage settlement, if any. Damage settlements are commonly restricted by insurance limits and legal expenses to less than ten thousand dollars—an amount that is con-

68. AACP 42 table 1-1.

69. See AACP 170-75.

70. AACP 77-81.

sumed by less than a year of hospitalization. Furthermore, such treatment is usually beyond the capacity of local doctors and hospitals. If the patient knows at all about the possibility of such treatment, he is confronted by the difficult choice of committing his last resources of cash and property, if any, in order to submit himself to further painful treatments for what must appear to be a dubious result.

I submit that these omissions demand correction. Since they are few in number, the maximum restoration of these individuals could be paid for at a cost to all motorists that would hardly be noticed, and the state itself would benefit by doing so.⁷¹

How should the omissions of rehabilitative treatment be supplied? The first requirement of an appropriate regime is that it must miss no one. It cannot depend upon whether the accident is due to the "fault" of some ascertained person, nor upon whether insurance limits are high enough, nor upon whether the guilty driver can be found, nor upon whether the injury victim is sufficiently litigious to bring a lawsuit or persuasive enough to make a good witness.⁷² Furthermore, it should be done by a system that is totally divorced from payment of cash benefits. The patient must not have the choice of spending his rehabilitation money for a new house instead. Least of all should rehabilitation efforts be permitted to use up money that the patient may need for subsistence.⁷³

These considerations rule out any system based upon individual

71. It costs as much to support a disabled worker and his family for a year on relief as to rehabilitate the worker so that he can become self-supporting. NATIONAL INSTITUTE ON REHABILITATION AND WORKMEN'S COMPENSATION, *REHABILITATING THE DISABLED WORKER: A PLATFORM FOR ACTION* 122 (Berkowitz ed. 1963).

The case for rehabilitation has also been supported by the speeches and writings of Arne Fougner. See note 65 *supra*.

72. Uninsured motorist insurance, unsatisfied judgment funds, and the New York Motor Vehicle Accident Indemnification plan all depend on someone being "liable" for the accident. For a discussion of these and other gap closing devices, see Keeton & O'Connell, *Basic Protection for the Traffic Victim*, section on "Closing the Gap in Financial Responsibility" [To be published]. Adams '60 at pp. 49-54 compares the cost of a Massachusetts type compulsory liability plan, a compensation scheme similar to a workmen's compensation program, and the present New Jersey system: voluntary insurance both for loss and liability, a financial responsibility statute, and an unsatisfied judgments fund. See also Comment, *Uninsured Motorist Insurance: California's Latest Answer to the Problem of the Financially Irresponsible Motorist*, 48 CALIF. L. REV. 516 (1960).

73. Berkowitz, *op. cit. supra* note 71, at 45-58; SOMERS & SOMERS, *WORKMEN'S COMPENSATION* 259-60 (1954); Cheit, *Summary Statement, Occupational Disability Study*, in *RESEARCH CONFERENCE ON WORKMEN'S COMPENSATION AND VOCATIONAL REHABILITATION* 90-97 (Jaffe ed. 1961); Leonard, *Legal Roadblocks to Rehabilitation*, 1963 PROC. SEC. OF INS. NEG. & COMP. LAW ABA 229.

liability or private insurance. If the right to rehabilitation depends upon finding the person "liable," even though negligence is removed, there will be cases where the victim goes uncompensated because liable persons cannot be found or are uninsured. Private loss insurance is also not the answer, because there is no practicable way to make every potential accident victim buy insurance.⁷⁴

An effective rehabilitation program requires a public fund that will supply the needed services without regard to whether the person who caused the loss is liable or can be found, or whether insurance was purchased by an appropriate person, or whether the cost of the benefits exceeds contractual limits. The important questions are how such a fund can be raised and how it should be disbursed.

The disbursement question will be considered first. There are two possibilities. One is a state rehabilitation office. Every state has an appropriate public agency, although most of them are inadequately financed and seem to be primarily oriented toward work-related injuries,⁷⁵ although these are probably less serious than automobile injuries.⁷⁶ The other possibility is a nonprofit association of hospitals, which exists in nearly every state in the form of a Blue Cross agency.⁷⁷ At their best, these agencies are almost as economical as public agencies—perhaps more so, when the hidden costs of public agencies are considered.⁷⁸

The second question—how the money should be raised—is truly

74. A plan under development in Massachusetts would change the law from compulsory automobile liability insurance to compulsory health and accident insurance to cover the entire family of an automobile owner at all times, and any other people who might be injured in an accident involving his vehicle. Keeton & O'Connell, *op. cit. supra* note 72.

75. The Vocational Rehabilitation Act of 1920 was entitled "An act to provide for the promotion of vocational rehabilitation of persons disabled in industry or otherwise and their return to civil employment." 41 Stat. 735 (1920). The most recent general amendments are the Vocational Rehabilitation Amendments of 1954, 68 Stat. 652, 29 U.S.C. §§ 21-42 (1958). There are no specific words disqualifying other injury victims, but the act and the amendments certainly were meant to be primarily for the benefit of workmen injured in their employment.

76. Recent statistics indicate that the total number of reported personal injuries is greater from work accidents than from automobile accidents, but that the number of fatalities is substantially higher for automobile accidents. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS (1963 ed.). If fatal automobile injuries are more frequent than fatal work injuries, it is probable that disabling injuries are also more frequent. The larger total number of work accidents presumably indicates either that the proportion of minor injuries is larger in work accidents or (more likely) that the reporting of injuries is more thorough in work accidents.

77. 2 McNERNEY, *op. cit. supra* note 48, at 1072.

78. *Id.* at 1072 n.1 lists the retention of Michigan Hospital Service (Blue Cross) as less than four per cent.

a secondary question, because the program is one that should be carried out no matter how the money is raised. If it had to be taken from general tax revenues, the program would still be worth undertaking. However, a better system would be to place a substantial part of the cost on motorists, through a tax on automobile sales, automobile registrations, gasoline and tire sales, or driver license registrations. The choice among these alternatives presents problems that are common to other reparation programs; they will be analyzed on a later page.

A program of this sort should not be confused with the controversial programs of socialized medicine for all or for the aged. The common criticisms of socialized medicine would have very little applicability to a rehabilitation program tied to automobile injuries. Since rehabilitation services are seldom purchased by individuals from their own funds, there would be very little sacrifice of any free choice. Since the injury must be shown to be automobile-caused, there are important checks on imaginary or chronic ailments. Since rehabilitation requires specialized services, rarely if ever rendered by family doctors, there would be no destruction of a traditional doctor-patient relationship; in fact, family doctors would be relied upon to refer rehabilitation patients to the proper clinics.

The only plausible argument that can be made against a program of rehabilitation for automobile victims is that such a program is equally necessary for victims of all other accidents. It may be true that such a broad program will eventually be found to be desirable, but there are excellent reasons for trying such a program first in the limited area of automobile accidents. One reason is that the volume of automobile litigation shows that there is a sense that justice demands reparation to an extent that does not exist with regard to kitchen accidents or boating accidents. Another reason is that demands for automobile injury reparation are crowding the courts and distorting the practice of law, so that some effort should be made to siphon off the demand for reparation. A third reason is that automobile accidents are unlikely to be imagined or fabricated, because they normally occur in public places and are subject to a system of police reporting. A fourth reason is that enough is known about automobile accidents so that their frequency can be predicted and costs of a program estimated. Finally, there is a good possibility of paying for rehabilitation of automobile victims by some sort of tax on automobiles, which are already registered and serialized and, therefore, amenable to taxation.

B. Subsistence

The second most important service that needs to be performed for injury victims is the provision of subsistence. A totally disabling injury, whether permanent or temporary, suddenly plunges a wage earner and his family into poverty. A permanently and totally disabling injury plunges even a non-wage earner, such as a child, into a lifetime of hopeless dependence, ending in pauperism if and when his parents are no longer able to provide support.

A great deal has already been done in the way of providing bare subsistence. For the family of a fatally injured wage earner who had about ten years of employment behind him, subsistence is now generally provided through the OASDI program.⁷⁹ It is also available for the totally and permanently disabled victim who has a similar earnings record, starting six months after the injury or after such longer period as is required to establish the permanence and totality of the injury.⁸⁰ But, there are important gaps in this program. The most glaring is that of the disabled young person—a child, a student, or a young workman—who has not yet worked his way into the charmed circle of the “fully insured” under social security.⁸¹ Even if he is “fully insured,” but has fewer than twenty quarters of coverage out of the last forty quarters, there are no disability benefits.⁸² And, even for the fully covered disability victim, there is an agonizing waiting period of many months before his disability is determined to be “total and permanent.” His medical bills are tremendous, and his family still must eat and find shelter from the elements. It is the desperate need during this period that often leads injury victims to accept damage settlements of derisory amounts or leads their lawyers to loan them money to avoid the necessity for such settlements. The death of a young person with dependents also may impose severe deprivation. If he was not “fully covered” by forty quarters of earnings, survivors’ benefits may be severely reduced.

It seems to me that these victims and their families merit the same level of subsistence that has been established by the social security system and that seems to have missed these individuals only because of the lack of a financial basis for the program. I sug-

79. 74 Stat. 946 (1960).

80. 72 Stat. 1020 (1958), as amended, 42 U.S.C. § 423(c)3 (Supp. V, 1964).

81. See note 31 *supra*.

82. 70 Stat. 815 (1956), 42 U.S.C. § 423(c)1 (1958), as amended, 42 U.S.C. § 423(c)1 (Supp. V, 1964).

gest that there is a suitable tax basis—the automobile—which should be called upon to relieve this area of distress. For the dependents of wage earners, payments should begin after about a week or two, as in the case of workmen's compensation or unemployment compensation.⁸³ For minors, who were presumably dependent on their parents at the time the injury was incurred, that dependency might be allowed to continue until the age of twenty-one, after which it would be fair to provide the disability victim with the means of minimum subsistence.

Obviously, the tort system is unsuited to supplying this kind of assistance. It is geared to distinguish percipiently between the guilty and the innocent and to measure the highly individualized losses, both economic and psychic, of each claimant. Its expensive paraphernalia should not be wasted on a program that makes no such discriminations. The subsistence program should operate with a minimum of rules, distinctions, and administrative personnel. The disbursing agency should be the same agency that already dispenses this kind of aid—the Social Security Administration.

Like other subsistence programs—unemployment insurance and OASDI—automobile accident benefits should be financed by a specific tax, but not by an increase in the tax on payrolls. The funds should come from taxes on motorists, just as for the rehabilitation program. The various forms that such a tax might take will be discussed later in this article.

C. *The Maintenance of Basic Income*

Subsistence at social security levels is better than destitution, but it is still at the boundary line of "poverty"—a domain that imposes disadvantages of health, education, and opportunity on those who are within it. Obviously, everyone would be pleased if the universal standard of living could be higher than this; that is the goal of the "war on poverty." The question is whether there is any basis for a local battle against the poverty of automobile injury victims—in other words, whether there is a need for a program for the maintenance of income at a modest level of health and decency that is somewhere above the level of social security subsistence.⁸⁴

83. Waiting periods permit minor losses to be covered from the most efficient of all sources—the injury victim's own resources. Compare SOMERS & SOMERS, *op. cit. supra* note 73, at 55.

84. The maximum benefit that a family can reap from social security on the basis of a single member's contribution is 254 dollars per month (3,048 dollars per year). The maximum that one individual can reap has recently been extended from \$127 per month to \$133 per month (\$1,596 per year). 72 Stat. 1013 (1958), 42 U.S.C. § 415(a)

The problem is not an easy one. Presumably no one will advocate improving the lot of the injury victim so much that he is better off than before he was injured. Therefore, people who live at the subsistence level before they are injured must continue to live at that level afterward. But, for those whose family income before injury was something above three thousand dollars, there are obvious objectives in income protection beyond the level provided by social security. One might aim, for instance, to maintain the income of the former six thousand dollar a year family at 3,600 dollars, and of the former twelve thousand dollar a year family at six thousand dollars. One may justify this on the humanitarian side by recognizing that the demoralizing effect of a subsistence income of three thousand dollars must be very different for a family that is accustomed to several times that much, than for those who have always lived at that income level.⁸⁵ On the utilitarian side, one must recognize that a program in which benefits are related to former earning levels is a way of reinforcing the free enterprise system; it is not an equalization of wealth, but rather is an extension of the rewards of achievement.

One can hardly be satisfied with the existing devices that attempt to protect the injury victim and his dependents from a catastrophic plunge into poverty. One of these is the tort system, which provides rather alluring lump sums to those who are injured, without contributory negligence, by drivers who can be identified, who are demonstrably negligent, and who carry liability insurance. Unfortunately, about half the injury victims fall into the gaps of this system instead of hitting the bases. Those who hit the bases must hold out doggedly against cheap settlements. The alluring sums are generally limited to the ten thousand dollar insurance limit less collection expenses, so that the net is utterly inadequate to make a significant income supplement over a lifetime. Since most injury

(1958), as amended, 42 U.S.C. § 415(a) (Supp. V, 1964). The Social Security Bulletin, Aug. 1963, p. 2 reported that in April of 1963 the average disability benefit award to disabled workers reached an all-time high of \$90.20 for the month or, if extended to a full year, \$1,080. This should be compared with the three thousand dollars per year income for an urban family of four that the President's Council of Economic Advisors describes as the breaking point between poverty and minimum maintenance. N.Y. Times, Jan. 21, 1964, p. 17, col. 4.

85. While writing generally on poverty in the United States, Michael Harrington discusses an urban family of four living on 6,147 dollars per year. He concludes, "Clearly, this is not a budget for the gracious living depicted by the American magazines. It is not, in contemporary terms, poverty or anything like it. But such a family would face a serious crisis in the event of a protracted illness or long-term unemployment for the family head." HARRINGTON, *THE OTHER AMERICA* 181 (1962).

victims do not enjoy investment advisory services, it is miraculous if the lump sum is invested so as to return any income at all a few years after the accident.

Another income supplement comes from sick leave pay and group disability insurance provided by employers for their entire group of employees.⁸⁶ The growth of these programs is heartening, but nearly all cover relatively short terms, ranging from a few months to two years.

Many people carry individual insurance against disability. This seems like an excellent solution, since it permits each wage earner to determine his own income protection needs. However, it appeals to relatively few customers and has a high operating expense rate.⁸⁷

These considerations in favor of an income maintenance plan are reinforced by reflection on a half-century of experience with workmen's compensation, which is supported by the same basic considerations. Although workmen's compensation is widely criticized, no one proposes to do away with its program of income replacement benefits based upon a scale related to prior earnings. One might also reflect upon the program of unemployment insurance, which aims to supply income on a graded scale to those who have been deprived of it.

The mystery is not why there should be a basic income maintenance program for automobile injury victims, but why it has been delayed so long. Workmen's compensation probably gained many votes because of the illusion that it would make the employers pay, although sophisticated observers generally recognized that costs would be passed on to consumers.⁸⁸ Automobile compensation has no such political leverage because it visibly burdens all automobile owners, who are nearly as numerous and often the same as the persons who might be benefited. What is more, it destroys the illusion of the tort system, which purports to place losses on the "negligent,"

86. In 1960, about 21 million persons had group income loss protection. SOURCE BOOK OF HEALTH INSURANCE DATA, 1962, at 21. The aggregate loss ratio for stock company individual accident insurance for 1961 was reported at 43.1%, which may be translated to a ratio of operating expenses to benefits paid of 132%. BEST'S FIRE AND CASUALTY AGGREGATES AND AVERAGES 125 (1961). See also Skolnik, *Income-Loss Protection Against Short-Term Sickness, 1948-62*, Social Security Bulletin, Jan. 1964, p. 9.

87. Like private health and accident insurance, however, private insurance against income loss is growing in importance. *Id.* at 10.

88. The cost of industrial accidents is "a legitimate cost of production." SOMERS & SOMERS, *op. cit. supra* note 73, at 27. The authors ascribe the following phrase to Lloyd George: "The cost of the product should bear the blood of the workingman." *Id.* at 28 n. 16.

although the bill is really paid by the mass of conscientious automobile owners who pay insurance premiums.

A second factor that has inhibited development of an income maintenance program for automobile victims is the doctrinaire position adhered to by proponents of automobile compensation plans that they must displace tort law.⁸⁹ This position is a result of slavishly copying the historical compromises of workmen's compensation, which resulted from the impotent position of workmen under common law.⁹⁰ The automobile injury claimant has no need to make so poor a bargain. Moreover, this form of proposal solidifies the opposition of the whole phalanx of general practitioners and claimants' lawyers who are the injury victims' natural allies.

What is proposed here is a basic income maintenance plan for wage earners, which would have only incidental effects on tort law. Overwhelming considerations of economic utility point toward it. The only question is how it can be most effectively implemented. Broadening the tort law regime would not be an efficient way of providing income replacement. Because tort law is slow, it misses the months when income is most needed. Because it pays in a lump sum, it affords no guarantee of continued support. Because it is expensive to operate, it needlessly doubles the burdens of those who must pay the bill.

The social security regime also seems unfitted to do the job of income replacement above poverty levels. Although social security programs in other countries manage to award varying pensions according to the preceding pay rate, the American system is attached to a virtually level benefit rate, subject only to deduction for inadequate years of coverage or an insufficient wage base. To introduce a system of graded benefits into the social security system would be to create formidable administrative and political complications.

Two general types of systems can be envisaged that would efficiently fill the need for basic income maintenance above the subsistence level. The best from a schematic viewpoint would be a single fund to which all drivers or owners would contribute taxes assessed at rates based upon the varying accident frequencies of various classes among them. This system would have the advantage of eliminating the expensive search for the particular automobile or combination of automobiles that caused the damage. It would also eliminate the needless expense of selling individual policies to

89. *E.g.*, THE COLUMBIA REPORT 132; EHRENZWEIG, *op. cit. supra* note 63, at 20.

90. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 1-52 (1936).

individual owners and the competition of insurance companies for the patronage of each automobile driver. The fund could be operated by a government corporation or by a franchised private monopoly in which all insurance companies would be permitted to participate; in either case, it would eliminate the complexity that results from regulating a multiplicity of dissimilar companies and compelling each to accept its proportionate share of undesirable risks.

But there are strong arguments against the monopoly system. Since tort liability insurance will continue to exist, the monopoly system would create a perpetual rivalry between the competitive and the monopoly insurance sectors. It would bring a host of economic issues and management problems into the realm of politics and remove them from the forces of the market place. The choice is closely parallel to the classic conflict between "state fund" and "private insurance" systems of workmen's compensation. Since both systems are now functioning effectively in workmen's compensation programs of various states, probably either system could effectively maintain basic income for automobile injury victims.⁹¹

Benefits under a basic income maintenance regime should be limited to some fraction of the lost wage and should be subject to a ceiling that would not be higher than the national average wage.⁹²

91. Dodd reviews the advantages claimed for state funds, private stock companies, and private mutual companies. *Id.* at 532-37. He concludes, "In reviewing the advantages claimed by each type of insurance system a striking similarity is noticeable. Each class of carrier alleges that it offers sounder security and a higher grade of service than the others, and, if it cannot lay claim to lower cost, the contention is advanced that the services rendered policy-holders are worth the higher premium." *Id.* at 537.

92. The states have set different percentages of the injured workman's wage as the maximum that he may receive. In addition, each state has set a maximum number of weeks during which one may receive this benefit, or a maximum number of dollars that he may collect, or, often, both. A chart of the states and their provisions in this respect appears in SOMERS & SOMERS, *op. cit. supra* note 73, at table III-B. Some writers have stated that one cannot give the beneficiary 100% of the injured man's previous wage because this would foster malingering among the partially or temporarily disabled. As the authors point out, however, the dead and the permanent-totally disabled do not mangle, and it is in their cases that the absolute maximums have the most pronounced effect. *Id.* at 83. The authors also make this interesting comment on the relationship between the percentages and the absolute maximums: "If it is claimed that a percentage of wages should form the basis of compensation, such percentages themselves represent maximums. The additional maximums not only create inequalities of treatment but, because legislatures cannot be expected regularly to relegate the absolute amounts to keep up with shifts in wage levels, they also vitiate the original claims of the law."

"Americans generally take pride that our social security systems attempt to take account of the varying wage levels of beneficiaries as distinguished from the flat-sum benefits in England. In actuality, the workmen's compensation laws are approaching a flat-sum system, at a low level, and doing it with complex formulas. There appears to

The fractional character is important because of the moral dangers of making invalidism as attractive as working.⁹³ The principle of full reparation is appropriately reserved, as under tort law, to beneficiaries who can prove themselves completely innocent of contributory fault. The ceiling is important for more subtle reasons. On the plane of economic theory, one may believe that the social gain in raising a man's income from five thousand dollars to 7,500 dollars is less than in raising it from 2,500 dollars to five thousand dollars.⁹⁴ On the plane of political reality, one may be sure that the public will never support a compulsory program for maintaining invalids at a higher income level than the average worker earns.

It is true that fractional benefit rates and the benefit ceilings have been a subject of bitter animadversion in the law of workmen's compensation.⁹⁵ But, the curse would be mitigated in the proposed automobile system because a tort action for uncompensated losses will remain available to the deserving.

D. *Other Losses: Property Damage and Psychic Harm*

If new programs of reparation to supply rehabilitation, subsistence, and income replacement were adopted, other losses of considerable magnitude would still remain to be considered. Among the most prominent of these are property damage (chiefly to automobiles) and psychic losses.

Damage to an automobile, unlike disabling injury or death to an individual, does not seem to call for any new measures in aid of injury victims. Automobiles are generally insured much more adequately than life and limb, partly because of the beneficent insistence of finance companies.⁹⁶ There is usually a deductible amount,

be no justification in equity or in the theory of workmen's compensation for imposing maximums upon maximums." *Id.* at 82.

93. Cf. *Resolution of the Section of Insurance, Negligence and Compensation Law of the American Bar Association*, 1962 PROC. SEC. OF INS. NEG. AND COMP. LAW, ABA 392, 393 (1962).

94. The theory of "diminishing utility" of money is discussed in many economic texts; it is reviewed in relation to automobile injuries in AACP 110-15.

95. "Virtually all students of the subject are in agreement as to the inadequacy of present cash benefits to meet the needs of the families affected." SOMERS & SOMERS, *op. cit. supra* note 73, at 82.

"The present scale of benefits provided for disabled workers and their dependents does not reach even a subsistence level under present living costs." U.S. Bureau of Labor Standards Bull., No. 85, 1946, p. 21.

"Almost all compensation payments are inadequate by present-day standards" 2 THE PRESIDENT'S COMMISSION ON THE HEALTH NEEDS OF THE NATION, BUILDING AMERICA'S HEALTH 77 (1953).

96. See Adams '60, at 19.

but this is precisely because most automobile owners find it cheaper to pay their own bills than to employ a corporation to pay on their behalf; to install a full compensation plan would result in doing expensively what is now done cheaply.

Little distress is created by the automobiles not covered by collision insurance. People with cars of small value are likely to omit collision insurance because they can afford to replace their cars more easily than to insure them. Any compensation system applied to such cases would be a useless burden.

There remain a few real or imaginary cases in which a man's car is demolished, he lacks the means to replace it, and the absence of a car imposes severe hardship. In one case discovered in the Michigan survey, a salesman who needed a new car accepted a ridiculously low settlement for his wife's back injury because he needed money to replace his car, which had been wrecked in her accident. One wonders if other means of raising a down payment—such as a personal loan—could not have been found; but, in any event, the deprivation in this case did not last long. If a family were too poor to finance a new car, they would probably be too poor to own it after purchase. The problem, then, is lack of income maintenance, rather than lack of reparation for the automobile. The loss of a car can impose severe hardship on a poor man and his family, but it is not a type of hardship that seems to call for society to intervene beyond the limits of tort law.

Pain, suffering, humiliation, and bereavement are also unsuitable subjects for a compensation plan. If they are so severe as to cause disability, the disability should be compensated as in other cases and for the same reasons. But it is doubtful that health and productivity—with which all of society is concerned—are substantially promoted by making other innocent members of society compensate the psychic sufferers. In addition, psychic losses do not lend themselves to any known regime of standardized treatment. No system has been proposed that could measure them otherwise than by the guess of twelve laymen. Thus, as is the case with property damage, psychic losses are properly left to the mercies of tort liability.

IV. ADAPTATIONS OF THE TORT SYSTEM

Nothing that has been disclosed by recent factual research or the experience of foreign countries has indicated that the tort system of reparation for automobile injuries should be abolished. To be sure,

it has been shown to be inadequate; that is a reason for supplementing it, not for abolishing it. It has been shown to be expensive; that is a good reason for shifting to other regimes the things that they can do better. But there remain many tasks that the tort system alone can perform. These include, in appropriate cases, the restoration of earnings above the minimal level that a universal insurance system will support, the reparation of property loss and psychic loss, the vindication of the innocent, and the punishment or admonition of the guilty. The tort system should be preserved and considerably amended to achieve these purposes.

It should be preserved also because it supplies a powerful incentive to keep the other systems working. Since it has no arbitrary ceilings, it provides a constant incentive to keep earnings restoration at reasonable levels; it is a safeguard against the obsolescent levels of compensation that have persisted in many workmen's compensation regimes.⁹⁷ Through the jury, it brings the popular conscience to bear in deciding when and how much reparation should be given. It is the tort system that has forced upon public consciousness the inadequacies of present reparation for automobile injuries and the absence of it in industrial injuries that has permitted that system to stagnate.

The major charge that has been leveled against the tort system in this paper and elsewhere is that it is an inefficient loss-spreading device. This is true. But it is a charge that will lose force when some of the functions of loss shifting have been cared for by more appropriate means. If new systems of rehabilitation, of subsistence, and of basic wage maintenance are introduced, the tort system will be miraculously cured of most of its ailments. Appellate judges will no longer find it necessary to distort principles of fault in order to provide social justice for injury victims. Juries will no longer feel so irresistibly the impulse to disregard instructions in order to help the impoverished. Injury victims will be less likely to accept derisory settlements because they need money so urgently. Delay of trial will no longer be so powerful a weapon in the hands of the defense.

In addition, a tremendous simplification of the insurance scene will result from the provision of loss-redistribution devices *outside* the tort system. There will be much less need for compulsory liability insurance, financial responsibility laws, or an unsatisfied judgment fund. If liability insurance becomes less essential, there will be

97. CHEIT, INJURY AND RECOVERY IN THE COURSE OF EMPLOYMENT 94-150 (1961); SOMERS & SOMERS, *op. cit. supra* note 73, at 82-83.

better reasons for freeing premium rates for liability insurance from administrative regulation and leaving them to the forces of the market place.

In short, the most glaring inadequacies of the tort system can be remedied without touching a line of tort law. Nevertheless, changes in tort law should be made, and some of them will become more urgent as well as more feasible because an underpinning of loss-shifting through social insurance has been provided. Among the myriad improvements that should be adopted, considered, or studied, I will mention here only the ones that are most relevant to other proposed reforms and to the disclosures of recent research.

A. *Correlation of Benefit Programs*

An outstanding need of tort law today is for systematic correlation with other benefit programs. Recent research shows that most injury victims receive reparation from more than one source and that the total received from non-tort sources is about equal to that from the tort source.⁹⁸ Moreover, the non-tort sources have grown much more rapidly in the past thirty years than the tort sources, so that the need of correlation is a rapidly increasing one.⁹⁹

There are three possible approaches to the problems raised by parallel benefit systems. One is cumulation: awarding reparation under each of the parallel systems without regard to reparation received under any of the others. A second is subrogation: permitting one regime to get reimbursement from another regime. A third is deduction: denying reparation under one regime because reparation has been received or can be obtained from another.

For the most part, tort law follows the cumulation system. A person who has received disability insurance benefits from a private insurance policy, or from the social security system, or from both has an undiminished right to obtain, in a tort action, payments for all his losses.¹⁰⁰ This solution does not seem to be based upon a conviction that it is socially desirable for anyone to be thrice paid, but rather upon a policy of nonrecognition or refusal to face the problem. Its real origin is obviously historical; tort law was born and

98. On the multitude of sources of reparation, see AACF 146 table 4-8, and the accompanying text. On the aggregates of the various sources, see AACF 147 table 4-9.

99. See AACF 70 fig. 1-2, 71 fig. 1-3, 175-80.

100. 2 HARPER & JAMES, TORTS § 25.22 (1956); MCCORMICK, DAMAGES §§ 87, 90 (1935). See *Eichel v. N.Y. Cent. R.R.*, 375 U.S. 253 (1963), where the Court held that in a railroad worker's suit against the railroad for personal injury the trial court properly excluded evidence that the claimant was receiving \$190 in pension benefits under the Railroad Retirement Act.

brought up before other loss-shifting regimes existed to any significant extent; judges seem to assume that if any accommodation is to be done, it is the responsibility of the newly arrived regimes, not of tort law. This attitude is suggested by the frequently used term "collateral sources rule," under which it is assumed that the main thing is the tort law and that all other programs are "collateral."¹⁰¹

Some obvious afterthoughts have been offered as justifications for the cumulation of benefits. It is sometimes said that the injury victim's luck or foresight in obtaining additional sources of reparation should not relieve the burden of the wrongdoer. This argument is quite irrelevant to most modern automobile accidents, since the damages aren't paid by wrongdoers, but instead are paid by insurance companies who collect their premiums from all the millions of automobile owners who buy insurance; it would have real relevance only in those very rare cases in which the negligent motorist pays damages from his own pocket. Even then, it would be strikingly inconsistent with the whole process of damage assessment, which is based upon the amount of loss and not at all (except in the case of punitive damages) upon the amount necessary to punish or admonish the wrongdoer.

Another justification sometimes offered is that noncumulation would deprive the injury victim of the benefit of the loss insurance that he has "bought" by paying premiums or social security taxes. This argument assumes that the injury victim has chosen his insurance with the contemplation of getting it plus tort damages. Of course, the assumption is completely vacuous as far as concerns social security. Applied to purely private contractual insurance, the argument is somewhat unrealistic in assuming that the purchaser has anything in mind so remote as double payment. However, it does contain a germ of truth, in that private insurers could, if they wished, provide in their policies for subrogating themselves to the insured's right against third parties, and they seldom do so except in the case of health insurance and property insurance.

The crucial question about cumulation is whether it is sound public policy. It certainly is not. Presumably, everyone would admit that there is at best a waste of resources in taking money from others to overpay for losses, except where damages are assessed by way of punishment. In the area of property insurance, the law has very

101. *I.e.*, collateral to the defendant. See 2 HARPER & JAMES, TORTS § 25.22 (1956); James, *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFFALO L. REV. 315, 335 (1959).

properly recognized that it is against public policy to permit anyone to overinsure.¹⁰² Although it is less likely that anyone will deliberately injure himself in order to get money than it is that he will deliberately injure his property for the same reason, there are two very real perils in overcompensation. One is the possible encouragement of a devil-may-care attitude toward one's own safety, which seems to be entirely too frequent among drivers. Another is the loss of public confidence in the reparation system that results from overcompensation. It probably builds up, on the one hand, a credo among claimants that they are entitled to a little profit or compensation for the trouble of collecting compensation and, on the other hand, a cynical belief among claim agents and jurors that nearly everybody is getting overpaid, so that there is no real need for the liability insurer to repay the entire loss.¹⁰³

It is unlikely that the cumulation of benefits rule would have enjoyed the tolerance accorded it if the lawgivers understood how great are the possibilities of overpayment and how many sources of uncorrelated compensation are sometimes available. Recognition of the true situation will probably push the law in the direction of one of the noncumulative solutions—subrogation or deduction.

Subrogation is the solution that tort law ordinarily applies to property loss situations. If an insurance company has insured an automobile owner against collision damage and has paid a damage bill, it is entitled to be repaid by any tort-feasor who is responsible for the damage. Recently, clauses have been inserted in health insurance policies that entitle hospital and medical insurers to similar reimbursement.¹⁰⁴ The theory of subrogation rests upon the assumptions that losses should not be overpaid and that it is better for the costs to be borne by the guilty tort-feasors than by the innocent buyers of loss insurance. Both propositions are completely sound, and the practice of subrogation often leads to the best possible allocation of loss in property cases.

If subrogation were frictionless, there would be a good deal to be said for the subrogation of insurers of life, disability, and health.

102. For a discussion of this in relation to the present context, see 2 HARPER & JAMES, TORTS § 25.22, at 1350-51 (1956).

103. HUNTING & NEUWIRTH, WHO SUES IN NEW YORK CITY? 29, 41, 43, 88, 132 (1962).

104. See Kimball & Davis, *The Extension of Insurance Subrogation*, 60 MICH. L. REV. 841, 861-62 (1962). In their conclusions, the authors discuss the methods that might be used to extend subrogation, but they decline to comment on its advisability. *Id.* at 869. See also HORN, SUBROGATION IN INSURANCE THEORY AND PRACTICE (1964), a comprehensive review of subrogation problems which came to the author's attention after the present article was completed.

The heavily burdened Blue Cross system would be relieved of some of its expenses, which would be loaded onto liability insurance. Health insurance would cost less, and the price of automobile ownership would reflect more accurately the total costs that it occasions.

But this advantage would be bought at a startling cost. Consider the case of a one thousand dollar hospital bill incurred by a Blue Cross policyholder. When his bill is paid by Blue Cross, the cost to all Blue Cross policyholders combined is about 1,080 dollars.¹⁰⁵ Assume further that Blue Cross obtains reimbursement by virtue of subrogation from Drivers' Liability Company, which has insured the tort-feasor. Blue Cross will presumably pay at least twenty-five per cent in collection expenses and will net about 750 dollars out of the one thousand dollars paid by Drivers' Liability. But the policyholders of Drivers' Liability will have incurred corresponding premium costs of sixteen hundred dollars, since liability insurers work at an expense rate equivalent to about sixty per cent of payouts.¹⁰⁶ The net effect of the subrogation is to make liability insurance policyholders pay sixteen hundred dollars in order to save 750 dollars for health insurance policyholders. Probably a large majority of the health insurance policyholders are also liability insurance policyholders, who have their costs doubled by subrogation without any increase of their benefits. The principal beneficiaries of the shift are insurance companies and lawyers.

These rough calculations find interesting echoes in the experience of foreign countries. Professor Street reports that health insurers in Great Britain in a recent year found that collection expenses for one class of subrogation claims amounted to ninety per cent of the collections.¹⁰⁷ In Sweden, subrogation of health insurance was aban-

105. In 1962, Blue Cross plans had operating costs of 5.7% of income. Blue Shield plans had 11.0%. The total Blue Cross-Blue Shield plan operating cost as a percentage of income was 7.2%. This would amount to about 8% of payouts. Reed & Rice, *Private Consumer Expenditures for Medical Care and Voluntary Health Insurance, 1948-62*, Social Security Bulletin, Dec. 1963, p. 11 table 10.

106. Compare payouts of 1.494 billion dollars with insurance expense of 926 million dollars. AACP 48, 54. Another source of similar ratios is BEST'S FIRE AND CASUALTY AGGREGATES AND AVERAGES. The 1961 edition shows automobile bodily injury losses as 59.4% of premiums earned for stock companies, 60.2% for mutuals. *Id.*, 1961, at 133, 205. For a somewhat similar calculation of costs on subrogation of a health insurer, see HORN, *op. cit. supra*, note 104, at 115-16. Horn indicates, however, that subrogation in property damage claims can be made quite economical. *Id.* at 130.

107. To collect 82 thousand pounds in income the hospitals paid out 73 thousand pounds in collection expense. AACP 425.

In addition, British insurers have widespread "knock for knock" agreements whereby neither company will sue the other for property damage to the automobile. Instead, each company pays its own insured under the comprehensive part of his policy. This reduces the total cost of automobile insurance by eliminating the expense of the unnecessary step of the loss insurer suing the liability insurer. AACP 432-33.

doned on the ground that it was a mere shifting of expense from one of a man's pockets to the other.¹⁰⁸

Subrogation, then, is a solution that would have theoretical attractions but that seems to involve incidental costs which outweigh its benefits. One must applaud the conclusion reached many years ago by Professor James, on a more intuitive analysis, that losses should be left with the first loss-distributing agency that incurs them and not reshifted to other loss-distributing agencies.¹⁰⁹

If subrogation is rejected, how is cumulation of benefits to be avoided? The alternative is deduction. Deduction should most obviously be applied when an injury victim receives free or donated care. Suppose, for instance, a child is struck by an automobile and incurs a potentially crippling injury. After his health insurance is exhausted, treatments are continued at the charge of the Society for Crippled Children. After treatment is concluded, his claim against the tort-feasor comes to trial. Is he entitled to include in his tort claim the value of the medical treatment received at the expense of the Society? It has no claim to subrogation, since it paid for the services as a free gift. The law is in confusion, but there is some indication that the child is entitled to receive the fair value of the medical services he received.¹¹⁰ If this is the law, it should be changed. The expenses paid by a charitable agency should be deducted or excluded from the amount otherwise recoverable. The same conclusion seems warranted with respect to the health insurance which, in the hypothetical case, paid for the child's initial emergency treatment and which is subject to either cumulation or subrogation under present law.¹¹¹ It should be deducted from recoverable damages in the interests of minimizing the total cost to society.

108. AACP 445-46.

109. James, *Indemnity, Subrogation, and Contribution and the Efficient Distribution of Accident Losses*, 21 NACCA L. J. 360 (1958). See also 2 HARPER & JAMES, *TORTS* *op. cit. supra* note 102, § 25.23, at 1355. For a very competent defense of subrogation, see HORN, *op. cit. supra*, note 104. Most of Horn's arguments and statistics relate to property insurance, not personal insurance.

110. See McCORMICK, *op. cit. supra* note 100, § 90, at 325. "The generalized standard of the 'value' of the necessary services rather than the theory of reimbursement for the specific outlay, offers a ready basis on which to justify recovery."

Harper and James admit that the individual may recover the value of services actually paid for by a government agency, but they maintain that it ought not to be allowed, arguing that the government does not mean to confer a bounty on the recipient, but merely to make certain that his needs are fulfilled; when the government has paid for these needs, the defendant need not. 2 HARPER & JAMES, *TORTS* § 25.22, at 1350 (1956). Conversely, if the wrong-doer is to be punished by being made to pay, the government does not mean to relieve him of this duty by paying the plaintiff's expenses.

111. See authorities cited in note 100 *supra*.

There is one weakness in this solution. It leads to the concealment of a part of the cost of automobile operation. It is not necessarily important that every penny of the costs of automobile operation be shifted to motorists; but, if it should be done in this instance, there is a much cheaper device than subrogation. That is to impose a tax on motorists and use the proceeds to subsidize public health facilities. This can probably be done at an operating cost of under three per cent, instead of over 120 per cent.¹¹²

The case for deduction of benefits is just as strong with respect to disability and survivorship benefits under the social security system. Consider the case of a man who is totally and permanently disabled; his former income was five thousand dollars a year; under OASDI it will be about 1,500 dollars.¹¹³ Should tort damages be assessed at five thousand dollars a year or at 3,500 dollars? The latter figure is obviously the one that corresponds to the facts and to the theory that damages are to compensate loss, not to generate profit.

In opposition to this obvious lesson, the argument will be made that, if damages are reduced, motorists will fail to pay the total costs of automobile operation. If this objective is desired, it can be done simply enough; an automobile tax can be imposed, with proceeds going to the OASDI investment fund.

Private life insurance benefits present quite a different case and ordinarily should not be deducted from tort damages. A large fraction of life insurance benefits is a return of savings, which could be cashed in or borrowed upon before death. This is no more appropriate for deduction than is a savings account. Another large part of life insurance benefits is not protection against loss, but gifts; they are the counterpart of old-fashioned legacies.¹¹⁴ There is no public policy against legacies, and the law should not seek to nullify contractual arrangements to confer them. But, even if life insurance were deductible in theory, there would be few cases for the deduction. The death cases are large loss cases, and evidence shows that most large economic losses are grossly underpaid, rather than overpaid.

There remain a few cases where over-compensation of large losses occurs, and one may speculate on whether the jury should be in-

112. See AACP 59 table 1-4, 61 fig. 1-1.

113. 70 Stat. 815 (1956), as amended, 42 U.S.C. § 423(a)2 (Supp. V, 1964); 72 Stat. 1013 (1958), 42 U.S.C. § 415(a) (1958), as amended, 42 U.S.C. § 415(a) (Supp. V, 1964).

114. On the basis of an analogy between life insurance and a savings account or an annuity, Harper and James reach the conclusion that life insurance should not be deducted. 2 HARPER & JAMES, TORTS § 25.22, at 1350-52 (1956).

formed of the life insurance benefits and instructed to deduct them in proper cases. Probably everyone would concede the advantage of deducting flight insurance benefits from damages in suits against airline companies. In many cases where the evidence would fail to void the insurance contract, it would nevertheless show such lack of donative intent that the collection of cumulative tort damages should be denied. Although this type of problem has been best publicized in airline cases, the Harvard Public Health studies have indicated that it also exists in automotive murder or suicide.¹¹⁵ To let the jury deduct life insurance benefits would tend to reduce the moral risk inherent in compensation for death.

A second reason for letting the jury consider life insurance benefits is more subtle. It involves a recognition that the jury does its job not only by following literally the instructions that the judge gives, but also by tempering the law with "fireside equity."¹¹⁶ But the jury's view of fireside equity is half-blinded if it is not told about the non-tort sources of reparation that are available to the accident victim's survivors.

For these reasons, I advocate that life insurance benefits, like other benefits, should be deductible from tort damages when the jury finds that they represent an excess over policy reserve values and that the policies were not purchased with donative intent. The gross damages from which they would be deducted would include compensation for grief according to existing tort principles. The main objective is that the jury should make its decisions with full knowledge of dependents' insurance resources.

B. *Promoting Settlements*

Probably the most notorious of the evils of the tort system is the tremendous duration of cases, of which less than half are settled within a year and many not for two or three years.¹¹⁷ Although the human tragedy of delayed settlements will be greatly alleviated if the "new prescriptions" proposed in the preceding pages are adopted, there will still be powerful reasons for promoting early settlements. Deprivation in 1964 can not be erased by surplus in 1967. The height of the ridiculous is achieved when a man's heirs enjoy compensation for their ancestor's prolonged suffering. Furthermore,

115. See RESEARCH ON FATAL HIGHWAY COLLISIONS, PAPERS 1961-62 (Mosely ed.); *id.*, PAPERS 1962-63, at 85-86.

116. See JOINER, CIVIL JUSTICE AND THE JURY 18-20, 37-38, 125-26 (1962) (quotation from Sir Patrick Devlin).

117. See authorities cited in note 2 *supra*.

nothing can expunge the sense of injustice accumulated through a long period of denial and uncertainty. The speeding up of settlements (not merely trials) would do more to relieve the distress of injury victims than any other conceivable change in tort law administration.

There are two possible ways to speed up settlements. One is to speed up trials, so that judgment and execution can be obtained within a few months by anyone who wants a trial. This ideal, which is occupying the effort of scholars, lawyers, and judges, plays will-o'-the-wisp with its pursuers. In Michigan there are twenty times as many serious cases susceptible of trial as are being tried; there are more than a hundred times as many cases of all degrees of seriousness as are being tried. It is not realistic to imagine that the number of conclusions by trial can be increased enough to reduce greatly trial delay in large cities unless supplemented by radical measures.

Even if it were possible to elect enough judges, build enough courtrooms, and draft enough jurors to cut down the trial backlog, a part of the problem would remain uncorrected. Lawyers would still threaten to hold out until trial as a bargaining device when they think the nerves or resources of the opponent are unequal to their own. Some incentive should be supplied for settling cases at reasonable amounts when reasonable estimates at a probable trial outcome are not far apart.

If early settlements could be promoted, there would be much more hope of reducing the backlog of cases seeking trial; in fact, this is the only realistic hope of cutting down the trial backlog. Earlier trials would mean speedier settlements for those who settle out of court as well as for those who go to trial. For the latter, it also would mean better trials, since the loss of witnesses and memories would be greatly reduced.¹¹⁸

Some of the impediments to settlement have been clearly disclosed by recent research. One of these is the adherence by parties on both sides to concepts of total victory. Plaintiffs demand record-making amounts; defendants make small offers, or none at all.¹¹⁹ What is needed is an increased incentive for each side to meet the other's terms. Foreign systems of law, particularly the British, have long known how to deal with this. They put the costs of litigation, in-

118. See the comment of James Marshall in *The Unreality of Automobile Litigation*, 50 A.B.A.J. 713, 715 (1964): "We know that there is a 'curve of forgetting' that is scoop-shaped, like the track of a ski jump."

119. AACF 202-09.

cluding barristers' fees, on the losing party.¹²⁰ An adaptation of this system is suggested for automobile personal injury claims in the United States. A plaintiff should be authorized to file in court a written demand for the settlement that he would accept. If it is not paid within thirty days and his eventual award is larger than the offer, the award should be augmented by litigation costs, including fees for attorneys' services incurred after the demand was filed. The demand should not be disclosed to the jury; the addition of costs should be made by the judge after the jury has returned its verdict. The judge could be given discretion to refuse to award costs in unusual circumstances.¹²¹ The effect of this device would be to create a real incentive to settle sooner rather than later; today, there is virtually none. However, it would not work in cases where the plaintiff's demand is above the defendant's liability insurance limits unless another item were added. The insurance company should be liable for the litigation costs *in addition* to the policy limits.

Defendants' liability insurers are not the only source of unreasonable refusals to settle. The record of high settlements in small loss cases and of settlements for "nuisance value" indicates that claimants and their counsel are also contributors.¹²² A defendant should also be permitted to file a written offer of settlement; if it is not accepted and the eventual award is lower than the offer, the defendant's expenses after the date of the offer should be deducted from any eventual award.

If these devices seem radical to American readers, they should recall that liability for costs, including attorneys' fees, is a historic and time-tested instrument of justice in the English common-law system.¹²³

C. *Enhancing Personal Responsibility*

One of the classic justifications of the tort system is that it places responsibility on the guilty tort-feasor; it is designed to create in every individual an incentive to avoid harming his fellow man.¹²⁴

120. AACP 434. For a collection of articles on the laws of several countries, indicating that the practice of making the unsuccessful party bear the others' costs is common in other legal systems, see 1962 PROC. SEC. OF INT'L AND COMP. LAW, ABA 117 (1963). The committee report of which these articles are a part concludes with an article suggesting adoption of a similar provision in American law. Geller, *Unreasonable Refusal To Settle and Calendar Congestion—Suggested Remedy*, 1962 PROC. SEC. ON INT'L AND COMP. LAW, A.B.A. 134 (1963).

121. Compare the plan proposed by Mr. Justice Geller. *Ibid.*

122. See generally AACP 137-58.

123. See Geller, *supra* note 120.

124. See James, *Accident Liability Reconsidered*, 57 YALE L.J. 549, 549 (1948).

This is a commendable objective, but it has been largely eliminated in automobile cases by the prevalence of liability insurance.¹²⁵ Since little thought and discussion have been given to this matter by others, the solutions that I propose may be startling in their novelty. They are proposed for examination and discussion, rather than for immediate adoption.

The simplest means of increasing personal responsibility for careful driving would be to make the cost of driving increase sharply with accident experience. The annual cost of a driver's license could be raised as the result of involvement in an accident in the preceding year; if there were a tax on drivers' licenses to support rehabilitation and subsistence for injury victims, this could increase with each accident involvement, regardless of fault. Unlike tort liability, which is covered by insurance, the tax increase would be personally felt. Moreover, it would create an incentive to avoid accidents, rather than merely to avoid a finding of negligence.

Another means of enhancing personal responsibility would be to increase the costs of insurance for persons who appear to be bad risks or who have unfavorable accident records. At present, although insurance renewals are often denied to "bad risks," they can usually become "assigned risks" with another company at a standard premium. Insurance commissioners directly or indirectly discourage companies from raising premiums for particular classes on the ground that the increases are not "actuarially justified"—a very technical standard. In this way, they prevent the companies from establishing classes that would operate as safety incentives.

The insurance commissioners are doubtless justified in their present reluctance to permit rates for disfavored classes to sky-rocket; the effect of high rates might be a lessening of insurance coverage of those from whom the public most needs protection. But if other means were provided for protecting injury victims—a rehabilitation plan, a subsistence program, and a basic income maintenance system—liability insurance could more safely be left to the play of competitive forces. There seems to be plenty of price competition among insurance companies, so that commissioner intervention is not needed to prevent the over-all premium level from rising too high.¹²⁶

125. AACP 265 table 8-5.

126. "Since competition is an adequate barrier to excessive rates, the major concern of public control is with rate adequacy and company solvency." CRANE, *AUTOMOBILE INSURANCE RATE REGULATION* 133 (1962). Company solvency can be maintained in a number of ways other than rate regulation. For examples and a discussion of their merits, see *id.* at 133-44.

A third possible means of enhancing personal responsibility would be to limit the completeness of insurance coverage. Perhaps all liability insurance tends to weaken personal responsibility; it is justified in most cases because compensation of loss to the claimant and avoidance of impoverishment of the defendant outweigh the responsibility objective. However, there are many situations in which the advantages of providing reparation are outweighed by the weakening of personal responsibility. It has long been declared that intentional assaults cannot be covered by liability insurance; it would be against public policy to protect one's self against liability for intentional wrongdoing.¹²⁷ For similar reasons, in all cases where recklessness is charged, the jury should be required to separate compensatory damages from punitive damages. Liability insurance should cover only the former; there is no reason to admonish the insurance company.¹²⁸

A similar distinction might be drawn between damages for economic loss and damages for psychic loss. It must be remembered that damages paid by insurance companies do not come only from wrongdoers; they come from all the buyers of insurance, most of whom are quite guiltless of the accidents for which they indirectly pay. Probably no one would seriously advocate a tax upon all drivers to pay for the pain and suffering of the innocently injured, although at the present time that is the effect of damage awards for pain and suffering. Damages for pain and suffering are rationalized on the ground that potential wrongdoers should be deterred to the extent of the pain they will cause, as well as the economic loss. Therefore, these damages can do their appointed work only when they are paid from the wrongdoer's pocket; when they are coming from the rightdoers' pockets, they amount to unjust enrichment.

To correct this anomaly is simple enough. Jurors could be instructed to identify damages for pain and suffering (like punitive damages) in a separate award, which insurance companies could be forbidden to cover. This reform would have very little practical effect on compensation of extremely serious and fatal injuries, because very little pain and suffering is paid for in those cases; usually not even the economic losses are fully covered. It might have a considerable effect on the nuisance value of small loss cases, where the danger

127. See *Sheehan v. Goriansky*, 321 Mass. 200, 72 N.E.2d 533 (1947).

128. Cf. Note, *Punitive Damages and Their Possible Application in Automobile Accident Litigation*, 46 VA. L. REV. 1036 (1960).

of a large verdict based partly on pain and suffering frequently leads insurance companies to settle for more than economic loss.

A fifth device for enhancing the responsibility of drivers, particularly uninsured drivers, would require a change in the law governing discharge of tort claims in bankruptcy. Ninety per cent of individual bankrupts have no assets that are liable to creditors.¹²⁹ When such a person suffers a tort judgment, as he may, he escapes scot-free. His only penalties for maiming or killing someone are his filing fees and attorney's fees in bankruptcy. He has little incentive to avoid accidents or even to insure; for many city-dwellers, going through bankruptcy is no more expensive than paying an insurance premium and is much less regular.¹³⁰

There is a simple treatment for this ill. Discharge of judgments for negligent injury should be awarded only in cases in which substantial assets are surrendered. Where the defendant has no assets, he should pay a reasonable portion of his wages for one, two, or three years. This could be achieved by making tort judgments dischargeable only in proceedings under chapter XIII of the Bankruptcy Act, where the judge may require periodic payments for a period of up to three years.¹³¹

Besides admonishing negligent drivers, these changes would have a secondary beneficial effect. They would rebuild a public consciousness that damages for negligence should be assessed only because the defendant is guilty, not merely because the plaintiff is needy. Such reforms perhaps could not be urged if tort law continued to be the only aid keeping an injury victim from destitution. When the recommended provisions for rehabilitation, subsistence, and wage replacement have been made, tort law can resume the function for which it is best designed—the reparation of the innocent at the expense of the guilty.

129. Of all bankruptcies filed in fiscal year 1963, 89.5% were by non-business debtors. TABLES OF BANKRUPTCY STATISTICS 5 (Administrative Office of the U.S. Courts 1964). Of all bankruptcies terminated in fiscal year 1963, 62.7% had no assets and an additional 11.4% had so few assets that they did not even cover the cost of the judicial administration. *Id.* at 8.

130. As early as 1932, an article in the *Yale Law Journal* suggested an appraisal of the function being performed by discharge in bankruptcy in light of the increasing number of automobile tort judgments being scheduled as the sole or at least the major liability. Douglas, *Some Functional Aspects of Bankruptcy*, 41 YALE L.J. 329, 343 (1932).

131. It has been suggested that a provision be made for *involuntary* proceedings under chapter XIII. This would provide incentive for the debtor to forestall the creditors by a voluntary petition and periodic payments. MacLachlan, *Puritanical Therapy for Wage Earners*, 68 COM. L.J. 87, 89 (1963).

V. MODES OF SANCTION

The "new prescriptions" proposed in this paper consist chiefly of objectives to be reached; the modes of sanction require further comment. Without detailing specific legal propositions, some general observations will be made concerning the choice of modes by which the desired ends can be achieved.

A. *The Multiplicity of Remedies*

The human mind longs for simplicity—for single formulas to solve myriad problems. The singular mode is nowhere better illustrated than in the tort action, which purports to supply in a single proceeding the means for meeting doctor bills, supplying subsistence, restoring earnings, equalizing property losses, assuaging suffering, deterring negligence, punishing recklessness or wrong intent, and vindicating innocence. Although this diversity of aims is the reason for the failure of the tort remedy, the famous Columbia report, with incredible naiveté, purported to supplant it with another single compensation plan, which was to do all that needed doing about automobile injuries.¹³² The sophisticated Connecticut case studies, which taught a less satisfying lesson, were tucked into an appendix.¹³³

As stated earlier in this article, one of the lessons of recent research, foreshadowed by the Connecticut case studies, is that a multiplicity of remedies is already at work in automobile injury cases—not only tort law, but also workmen's compensation, health insurance, life insurance, collision insurance, Old Age, Survivors' and Disability Insurance, rehabilitation programs, and public assistance.¹³⁴ Each one of these programs does some part of the job distinctly better than alternatives can do it. A sensible program for automobile injuries would use each of these systems for the things it can do best; for the things that none of them does well, new regimes may have to be devised. A good program should include an extension of rehabilitation programs, an extension of social security, and a new program of basic income maintenance somewhat similar to workmen's compensation. Alongside these, there should be a continuation of health insurance, life insurance, collision insurance, and tort law without basic change except to correlate them with other regimes.

132. THE COLUMBIA REPORT 132.

133. *Id.* at 218.

134. See note 98 *supra*.

B. *The Correlation of Regimes*

The multiplicity of remedies should not be a subject of apprehension; it has the merit of reducing the seriousness of error made in employing any one of them alone. The problem of correlation will not be immense as long as each regime has a special job that is distinct from the others. There will be no correlation problems among health insurance, life insurance, and subsistence provision, because each does a different job. There are, however, important potential overlaps between health insurance and rehabilitation; between subsistence provisions (social security) and basic income maintenance; between basic income maintenance and workmen's compensation; and between nearly every regime and tort law, which potentially covers every kind of loss.

For all these correlations there should be a simple principle of preference. Where the benefits of two regimes are applicable, the need should be filled by the regime which functions with least expense, disturbance, and conflict. This is the principle that will do the most good for injury victims and have the least burden on the motorist or general taxpayers, who will eventually have to pay the bill in one form or another.

This principle is just the opposite of that which the common law has evolved. The law has proceeded on the assumption that every loss should be shifted to the party whose fault caused it. Since the only system for assessing fault is the tort system, the result is imposition of the greatest possible burden on the group of premium payers who eventually pick up the bill. Not only does this require administration by the most expensive system; it requires that many losses be administered twice—first by the particular loss insurance regime and second by the tort regime.

The proposed preference system would be best effectuated by statutory rules for the most frequently recurring cases; but judges could fill in the interstices by following general principles. A few illustrations will indicate how it would work:

- (1) Hospital and medical bills would be paid by ordinary health insurance so far as possible and within policy limits; rehabilitation funds would be drawn on in qualified cases when health insurance runs out. This is because rehabilitation is a more restrictive concept, involving more arguable distinctions than general hospital and medical care.
- (2) Sick leave pay and group disability benefits paid by the employer or his insurance company would be paid regardless of the availability of social security and a basic income main-

tenance plan, because the former involve the least disturbance of the existing payment plan.

(3) Basic income maintenance should begin when employer and employer-financed payments stop.

(4) Subsistence payments from the social security regime should begin when employer payments or basic income maintenance payments stop. Although social security payments are perhaps more "efficient" than the others, the benefits would be lower than under other systems, and it is probably cheaper to have only one system supporting the beneficiary at one time.

(5) Payments from all these sources—health insurance, rehabilitation services, sick leave, social security, basic income maintenance—should be deductible from tort damages.

C. *The Level of the Burden on Automobileists*

Most legal writing, including the foregoing lines of this piece, has assumed that motorists ought to pay the full costs of injuries attributed to the operation of automobiles, insofar as these can be determined. This is based either upon the price theory, which asserts that the price of using automobiles should include the costs of such use, or upon the incentive theory, which asserts that automobileists should be given an incentive to avoid accidents that is at least equal to the costs of the accidents they cause.

The price theory is a corollary of the general proposition that explains that cake should be dearer than bread because it requires more butter, and hand-tailored clothes more expensive than machine-made ones because the former require more labor.¹³⁵ It is not very conclusive, however, because there are many economic goods for which society does not even attempt to charge the full costs to the users.¹³⁶ Education, police protection, and sidewalks are good examples. Transportation has always been a hybrid case, with some of the costs borne by users and some by the public via subsidies for building railroads and airports and direct public expenditure for public road-building; the bearing of part of the costs by the public seems to be thoroughly justified by the countless indirect benefits of transportation. Among the conspicuous contemporary benefits of the automobile is the ability of millions of laboring people to live in suburban communities with grass and flowers, instead of in urban tenements.

It seems futile to argue that motorists should pay the full costs

135. See Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499 (1961).

136. For a review of theory on the social utility of compensation in relation to reparation problems, see AACP 108-36.

of automobile accidents. It would be more cogent to urge that automobile costs be made to include the costs of injury to the same extent as the economic units with which they compete. As means of essential transportation, they compete chiefly with common carriers, which probably pay more completely for the injuries they cause than do private automobile owners. Carriers are generally financially able to pay the entire losses, instead of escaping payment (as do uninsured automobilists) or paying only up to a modest insurance limit (as frequently do insured automobilists).

There is another reason why the price argument is imperfectly applicable to automobile accidents. While every cake or suit of clothes has costs that are uniform for that kind of commodity, the amount of losses caused by the automobile varies immensely from driver to driver and from automobile to automobile. There is no particular merit in putting a high price on the driving of a man who will never cause a serious accident. Yet, virtually all the devices of automobile injury reparation result in spreading costs over the entire body of drivers with very little differentiation. If the entire costs of automobile injuries were spread in the same way, it is quite conceivable that thousands of safe drivers would be priced off the road by the activities of relatively few dangerous ones.

If one turns from the price theory to the incentive theory, one finds even less reason for placing all the costs of automobile injuries on the motorists. Accidents can be avoided not only by motorists, but also by pedestrians. They can also be diminished by building safer highways, cutting out flashing electric signs, and moderating the sale of liquor at roadside taverns.

Thus, it seems unsound to argue that the total costs of automobile injuries must be relentlessly spread among motorists rather than being picked up by systems of health insurance or social security or borne in some part by the initial victims. On the contrary, it seems sensible to let some of the minor costs lie upon their initial victims, to cover some costs with general health and welfare programs, to charge some to automobilists as a class through insurance, and to see that a few of the costs come out of the private pocketbooks of negligent drivers.

No one has yet proposed a formula for deciding how much of the total cost should be borne in each way. The bearing of about a fourth of the total costs by motorists through liability insurance does not seem *prima facie* excessive. But when the cost of liability insurance for a car owned by a young bachelor rises to about \$50 dollars

per year, as it does in Brooklyn, N. Y., it seems likely that the impediment to automobile ownership has risen too high.¹³⁷

D. *The Taxing of Automobilists*

At least two, and possibly three, of the new prescriptions that I have proposed in the preceding pages could be supported by taxes on automobilists. These taxes might take any number of forms. There might be a tax on new automobile sales, or on annual automobile registrations, or on the gasoline and tires consumed by automobilists, or on drivers' licenses. In fact, all of these elements are presently taxed, and some of the existing taxes might be regarded as motorists' contributions to the rehabilitation or subsistence fund. But increased taxes will certainly be required, and lawmakers should consider where they can be applied with optimum efficiency.

The most useful form of tax on new automobile sales would be one that discriminated among types of automobiles in relation to their tendency to produce accidents. The type of survey made by the Cornell University Automotive Crash Injury Research could no doubt yield statistics to show whether it is true, as some writers charge, that sports cars, or convertibles, or super-powered cars occasion larger numbers of injuries than others.¹³⁸ If so, they should make heavier contributions to the reparation of injuries. This would be much more sensible than taxing them according to their gross value, which results in increasing the extra costs of seat belts, power brakes, padded dashboards, and all other safety devices.

Another important question to determine is whether old cars cause a disproportionate number of injuries.¹³⁹ If so, a heavy tax on new cars would have the undesired effect of increasing the costs of replacing an old car with a new one. On the other hand, a heavy registration tax would tend to diminish the apparent relative economy of keeping an old car. Where safety inspections are not re-

137. AACP 94 n.34.

138. See, e.g., KEATS, *THE INSOLENT CHARIOTS* 23 (1958); see generally O'Connell, *Taming the Automobile*, 58 NW. U.L. REV. 299, 334-56 (1963).

139. Studies have shown a statistical correlation between the old age and high mileage of cars and higher accident rates. E.g., Schreiber & Schecter, *Effects of Aging and Mileage on the Accident Rates of Vehicles*, in PASSENGER CAR DESIGN AND HIGHWAY SAFETY 122, 123 (1962). States that require vehicles to pass periodic inspection have consistently lower death rates than those that do not require such inspection. Lowery, *Vehicle Condition and Periodic Safety Inspections*, in *id.* at 109, 110.

O'Connell suggests that many old cars are driven by young drivers and calls the combination of the most dangerous cars and the most dangerous drivers "potentially disastrous." O'Connell, *supra* note 138.

quired, tax reductions could be awarded to older cars that pass an inspection of their brakes, tires, lights, doors, and seat belts.

An important potential source of revenue, virtually untapped, is the driver's license. For the most part, these have been issued at a minimum price. It might be a very wholesome thing to make a driver's license at least as expensive as an automobile license. It would also be useful to have different fees for different classes of drivers. It is much more appropriate to raise the drivers' license fees of young men than to raise the cost of the insurance bought by the young men's fathers.

E. *The Federal-State Puzzle*

No sensitive American can escape a twinge of nostalgia as he sees an area of law, once sacred to the delightful localism of state law, succumb to the necessities of federalism. But the automobile is the most literal example of a subject on which state particularism belongs to the horse and buggy days.

The objectives of any plan to improve automobile accident reparation are to eliminate impoverishments that result from them and to spread the costs equitably among those who cause them. Any program that seeks to alleviate these evils on a statewide basis is boxing with shadows. States like California and Michigan are tourist meccas, seasonally inundated with out-of-state automobiles and drivers. States like Illinois and New York are crossroads for traffic that neither originates nor terminates within the state. These states may impose heavy burdens on their own motorists in order to protect their citizens from serious loss, only to have them exposed to the less regulated drivers of other states. One is tempted to advocate that every state border should have, as in Europe, a police check of insurance certificates; but on one wants to put that kind of a burden on the interstate flow of traffic.

Any program for the aid of automobile injury victims will be more effective if built on a federal base. The rehabilitation program, the subsistence program, and the wage replacement program would be most effective if national in scope. This proposal does not exclude administration by state agencies under national norms, just as existing rehabilitation programs and unemployment insurance are conducted.

There is no need to impose corresponding federal uniformity on tort law. Here there is still room for Cardozo's "state laboratory" concept. But federal law should impose a uniform federal rule for

the deductibility of benefits from the federally imposed programs, in order to prevent a perversion of the programs by the inertia or confusion of state legislatures.

VI. SUMMARY

Recent empirical research makes possible new and fresh approaches to the problem of economic reparation for automobile injuries. As a lawyer who has been engaged in some of the research and who has given some thought to its implications, I present the following as some of my personal conclusions:

1. The way ahead is not through a single plan for automobile injuries; it is through keeping alive the plurality of existing programs—from social security to tort damages—with some extensions, additions, and correlations.

2. One urgent need that should be filled immediately is the adoption of a program that would provide rehabilitation, from surgery to vocational retraining, for every automobile injury victim, regardless of the circumstances of his injury.

3. A second urgent need is an extension of subsistence through the social security system to automobile injury victims and dependents of victims who are not now "fully covered" because they have not spent enough time in "covered employment."

4. A third desideratum—although less urgent than the preceding ones—is a program of basic income maintenance for wage earners; this would not apply to non-wage-earners.

5. Tort actions would continue, but damage rules should be revised to deduct from recoverable damages the amounts that injury victims have recovered or can recover from health insurance, rehabilitation programs, social security, and disability insurance.

6. Measures should be taken to enhance the personal responsibility of tort-feasors. Suggested for consideration are exclusion of punitive damages and psychic damages from insurance coverage; denial of unconditional bankruptcy discharges for personal injury judgments; permitting insurance companies to set up safety incentive rates without regard to "actuarial justification."

7. Incentives to make and accept reasonable settlement offers should be increased by assessing the opponents' full costs of litigation on the party who rejects a reasonable settlement offer.

8. The classic "automobile injury compensation plan" and the more recent compulsory liability insurance laws are decidedly inferior to other practicable treatments of the reparation problem.